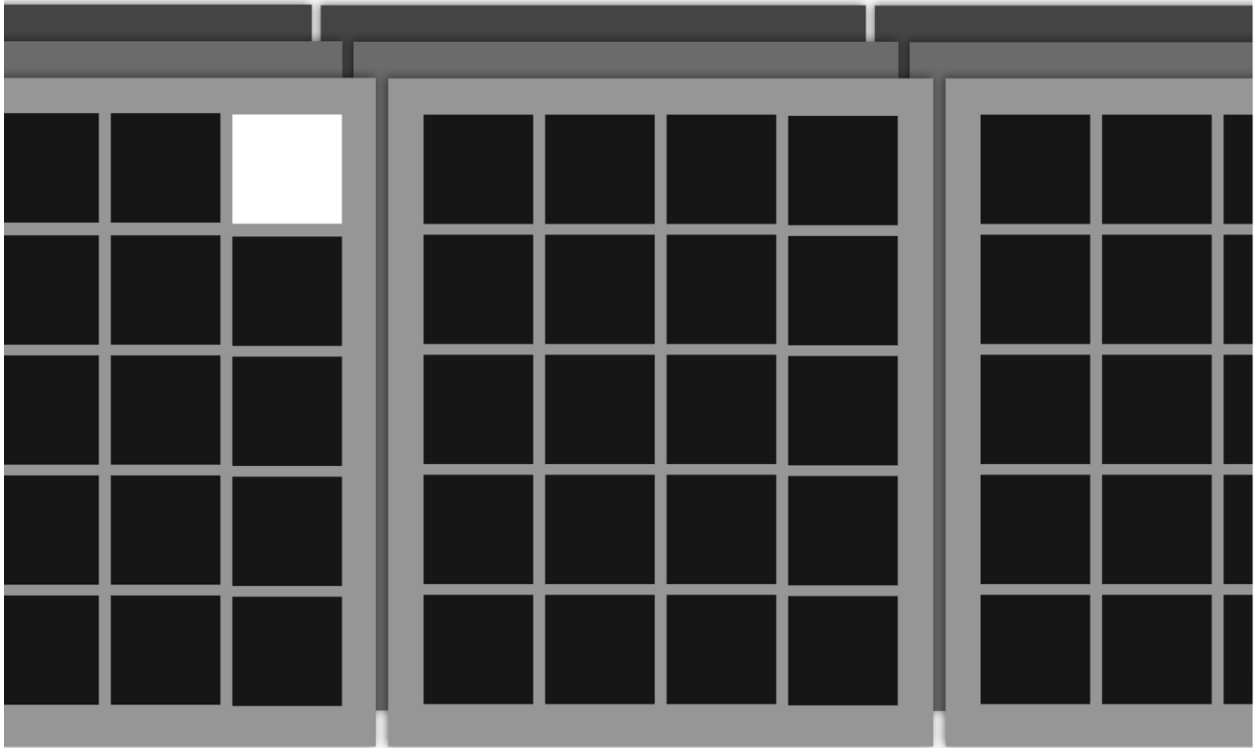


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Wisconsin Attorney's Desk Reference

Volume I



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Foreword

The *Wisconsin Attorney's Desk Reference* is an easy-to-use reference work written specifically for general practitioners, yet useful for anyone at any level needing a quick answer or a point of entry into an area of law. The *Desk Reference* is not intended to provide final answers to complex legal problems, but rather to provide a useful map for charting a course through new or unfamiliar areas of practice and to offer a starting place for research.

The first edition of the *Wisconsin Attorney's Desk Reference* was published in 1986 as a joint project of the General Practice Section and the State Bar of Wisconsin. The General Practice Section Board developed the idea after having seen similar projects from other bar associations. Together, the section board and the State Bar of Wisconsin PINNACLE® (then "CLE Books") selected a format based on the very popular Judicial Benchbooks and identified topics and authors for the new book. Herbert C. Liebman, III, Carl W. Ross, and William S. Wood were instrumental in supporting the project during their respective tenures as chairmen of the General Practice Section, and section board members including Richard L. Binder, Jerome E. Elliott, Kenneth A. Knudson, Jeffrey L. Kravat, Donald E. Mayew, Robert J. Misey, Joseph J. Muratore,

John E. Raftery, Katherine M. Reynolds, C. David Stellpflug, and Lawrence Alan Towers served as advisors and, in many cases, authors as well.

Nearly every year since its first publication, the *Desk Reference* has been updated, and over the years, the book has been expanded with new topics. The State Bar of Wisconsin is pleased to now offer the 11th edition of this most valuable resource. On behalf of the State Bar, I sincerely thank the book's many authors for their contributions and ongoing commitment. I also wish to acknowledge to work of the State Bar staff who participated in this revision. Special thanks go to Attorney-Editors Margie DeWind, Dean Hunter, Kristi Lemanski, Hana Miura, and Carolyn Schwerman for their careful editing of the book's many chapters; and to Lana Ferstl for coordinating the production of the new edition.

CAROL A. CHAPMAN, ESQ.
PUBLICATIONS MANAGER
STATE BAR OF WISCONSIN

About the Authors

Craig W. Albee is the executive director at the Federal Defender Services of Wisconsin, Inc. From 2000 to 2011, he was a partner in the criminal defense firm of Glynn, Fitzgerald & Albee. Before that he practiced with Shellow, Shellow & Glynn. Following his 1990 graduation from the University of Wisconsin Law School, he served as law clerk for Wisconsin Supreme Court Justice William A. Bablitch.

Jennifer L. Amundsen is the founder and principal at Amundsen Law Firm, LLC. While she primarily practices in the areas of business, intellectual property, and technology, she has also developed a niche practice in canine and equine law, advising owners and breeders of companion animals (primarily dogs) and horses on issues pertaining to their businesses and hobbies. She has represented dog clubs and equine groups, veterinarians, and boarding facilities, and she is a frequent speaker on legal topics pertaining to animals. Ms. Amundsen is a 2003 graduate of the University of Wisconsin Law School (J.D.) and a 1994 graduate of Kalamazoo College (B.A.).

Kathleen R. Avoles is a partner at Willow River Law, LLC, and a member of the trial and litigation team, representing clients in northwestern Wisconsin. Ms. Avoles was admitted to practice law in 2007 and concentrates in family law, employment law, and civil litigation. Her family-law focus involves divorce and post-divorce matters, custody disputes, and paternity actions. She received her J.D. from William Mitchell College of Law in St. Paul, Minnesota, and was the recipient of the 2012 Martin Hanson Advocate's Prize by the Wisconsin Association of Criminal Defense Lawyers for successful defense at trial charging criminal homicide. Ms. Avoles was elected in 2013 as the St. Croix County Bar representative to the Criminal Justice Collaborating Council and now serves as executive vice chair. She previously served on the board of the St. Croix Valley Bar Association and regularly volunteers her time at the free legal clinics in her community and surrounding counties.

Richard L. Binder retired as a partner of Rohde Dales LLP in Sheboygan. He received his B.A. from the University of Wisconsin in 1971 and his J.D. from the University of Wisconsin in 1973. For more than 20 years, he was the reporter for the *Solo/Small Firm & General Practice News*.

Daniel A. Blasiolo, Ph.D., is a patent agent in the Intellectual Property Practice Group at the Madison office of DeWitt LLP. He received his Ph.D. in biochemistry from the University of Wisconsin-Madison

and is registered to practice before the U.S. Patent and Trademark Office. His practice concentrates on patent prosecution, particularly in the area of biotechnology and medical-related technology.

Jesse B. Blocher is a shareholder at Habush Habush & Rottier S.C.® and focuses his practice on personal-injury claims. Mr. Blocher is a Board Certified Civil Trial Advocate by the National Board of Trial Advocacy. His litigation, trial, and appellate experience spans a broad range of civil matters including cases arising out of automobile accidents, premises liability, environmental pollution, products liability, and insurance coverage. Mr. Blocher is a summa cum laude graduate of Marquette University Law School.

Bruce T. Block is a shareholder in the Milwaukee office of Reinhart Boerner Van Deuren s.c. He received his undergraduate degree in 1976 from the University of Wisconsin and his law degree in 1979 from Boston University. He is a member of the State Bar of Wisconsin, the Milwaukee Bar Association, and the American College of Real Estate Lawyers. Mr. Block has lectured extensively on numerous real estate-related issues, with particular emphasis on zoning and land use, tax incremental financing, historic preservation, and affordable housing. He is a member of the Greater Milwaukee Committee, a trustee of the Wisconsin Policy Forum, and chair of the UW-Milwaukee Real Estate Foundation.

Kyle G. Borkenhagen is a partner with the firm of Rohde Dales LLP in Sheboygan. He received his B.A. from the University of Wisconsin-Stevens Point in 2008 and his J.D. from Indiana University in 2010. His practice primarily focuses on personal-injury cases, insurance disputes, and commercial litigation.

Drew Cochrane is vice president of operations and general counsel at Pellitteri Waste Systems. He previously spent eight years as chief operating officer and general counsel for the New Glarus Brewing Company and, prior to that, 15 years in private practice, including 11 years with the Madison office of Stafford Rosenbaum LLP, where he was a senior partner and a member of the firm's board of directors. Mr. Cochrane received his undergraduate and law degrees from the University of Wisconsin in 1994 and 1999, respectively. Before entering private practice, Mr. Cochrane interned with the Wisconsin Supreme Court and worked as a law clerk in the Wisconsin Governor's Office and as a legislative aide in the Wisconsin State Assembly.

Kyle W. Engelke is a partner with the Madison law firm of Stafford Rosenbaum LLP. He received his undergraduate and law degrees from the University of Wisconsin. Mr. Engelke is a trial lawyer whose practice includes litigating commercial matters involving shareholder disputes and claims of tortious interference and misappropriation of trade secrets. Mr. Engelke is a member of the James E. Doyle American Inn of Court, appointee to the State Bar of Wisconsin Bench and Bar Committee, and president of the Dane County Bar Association.

Victor Forberger is a solo practitioner. Previously, he was an administrative law judge in unemployment appeals in Massachusetts and then a hearing officer for the state labor relations commission in Massachusetts. Since 2009, he has been either a supervising attorney or the clinic's managing attorney for the Unemployment Compensation Appeals Clinic, Inc., through which law students at the University of Wisconsin Law School handle unemployment cases. He has a J.D. from Northeastern School of Law and is a member of the state bars in Wisconsin and Massachusetts and the National Lawyers Guild.

Jennifer L. Gregor is a shareholder in the Madison office of Godfrey & Kahn, S.C. As a versatile intellectual property (IP) lawyer, she advises companies on their IP portfolios and disputes. She received her bachelor's degree from the University of Wisconsin-Madison in 2000, majoring in bacteriology and entomology. She received her J.D. from DePaul University College of Law in 2005. Ms. Gregor is the chair of the firm's Intellectual Property Litigation group. She is a past-president of the Western District of Wisconsin Bar Association and has significant experience in intellectual property litigation, including

copyright, patent, trademark, advertising, unfair competition, right of publicity, and trade secret cases. She is also active in the International Trademark Association and numerous community organizations.

Shawna Guinn is an assistant corporation counsel in the Dane County Corporation Counsel's Office. She handles CHIPS and termination of parental rights cases.

Michael S. Heffernan practiced for many years with Foley & Lardner LLP. Now retired, he limits his practice to divorce mediation. He received his B.A. from the University of Wisconsin-Madison and his J.D. from the University of Wisconsin Law School and served as a law clerk for the Wisconsin Supreme Court and as staff attorney for the Wisconsin Court of Appeals. Mr. Heffernan was a coauthor of the first edition of *Appellate Practice and Procedure in Wisconsin* in 1986 and has written all of the annual updates, and he is a coauthor of the *Wisconsin Attorney's Desk Reference*. Mr. Heffernan is a member of the State Bar of Wisconsin. He is also a past chair of the Appellate Practice Section of the State Bar.

Margaret Wrenn Hickey practices in the areas of divorce, family law, and elder law, including trusts for disabled persons, Title 19, and guardianships. She is a shareholder with Becker, Hickey & Poster, S.C., Milwaukee, and received her B.A. from Marquette University (1982, summa cum laude), where she was Phi Beta Kappa, and her J.D. from the University of Wisconsin Law School (1986, cum laude). Margaret is president of the State Bar of Wisconsin. She served on the State Bar of Wisconsin's Board of Governors (2005–15; Chair, 2006–07, Treasurer, 2009–11), is on the Diversity and Inclusion Oversight Committee and the Leadership Development Committee, and has been chair of the Elder Law and Special Needs Section and Family Law Section boards. She is a past president of the Milwaukee Bar Association. Margaret lectures frequently on elder law and family law at local, state, and national bar meetings and to community groups. Margaret is a member of the American Bar Association, the State Bar of Wisconsin, the Milwaukee Bar Association, the Waukesha Bar Association, the National Academy of Elder Law Attorneys, and the Association for Women Lawyers and is a Fellow of the American Bar Foundation and the American Academy of Matrimonial Lawyers.

Christopher J. Hussin is a partner in and chair of the Patent, Trademark and Copyright Team of the Madison law firm of Boardman & Clark LLP. Chris focuses on all areas of patent, trademark, and copyright law and manages the trademark portfolios of a number of international companies. He assists clients in brand development and management, the selection and clearance of trademarks, the registration and enforcement of trademarks and copyrights in the United States and internationally, and intellectual property-related litigation. He is also experienced in drafting licenses, assignments, and other intellectual property-related contracts and business documents. Chris received his B.S. in civil engineering from the University of Wisconsin and his law degree from the University of Denver College of Law.

Evan Knupp is a partner in the law firm of Roney & Knupp, LLC in Milwaukee. He received his B.A. from the University of Wisconsin-Madison and his J.D. from Marquette Law School. He is a member of the State Bar of Wisconsin. Mr. Knupp has practiced landlord-tenant law in the Milwaukee area for over 10 years, representing both landlords and tenants.

Benjamin T. Kurten chairs Reinhart Boerner Van Deuren s.c.'s Immigration Law Group and is a shareholder in the firm's Labor and Employment and International Practices. Ben has over 23 years of immigration law experience and represents both large and small clients across the United States in a variety of industries, including manufacturing, health care, financial services, technology, entertainment, consumer goods, and agriculture. His work includes assisting clients with navigating the immigration regulations to be able to employ foreign-born talent as well as to ensure their compliance with U.S. immigration regulations. He also regularly assists clients with family-based immigration matters as well as naturalization and citizenship matters. Ben has successfully argued removal, asylum, and employment cases before the

Executive Office for Immigration Review, Board of Immigration Appeals, and the Administrative Appeals Office. In addition, Ben is a member of the American Immigration Lawyers Association, is a frequent speaker and panelist on the topic of immigration, has written numerous articles that have been published in professional journals as well as online, and has authored the Immigration Law chapter of the *Wisconsin Attorney's Desk Reference* for many years. Ben graduated from the University of Wisconsin Law School in 1997 and lives in Grafton with his wife and two sons.

Gabriela A. Leija is an associate federal defender at the Federal Defender Services of Wisconsin, Inc. From 2005 to 2012, she worked for the Wisconsin State Public Defender in various administrative and client services roles for the Milwaukee Trial and Appellate offices. Following her graduation from Marquette University Law School in the fall of 2014, she returned to the Wisconsin State Public Defender's office as a trial attorney before joining Federal Defender Services in 2016.

Alexander C. Lemke is an associate in the Milwaukee office of Godfrey & Kahn, S.C. He advises clients on a wide range of intellectual property (IP) matters including procuring and maintaining U.S. and international patents, trademarks, and copyrights. His practice also involves a large focus on IP litigation. Mr. Lemke received his bachelor's degree in chemistry from the University of Dallas in 2014 and his law degree from the University of Tulsa in 2018, graduating with highest honors. Prior to joining Godfrey & Kahn, he served as a law clerk on the Wisconsin Supreme Court.

Eric W. Lengell is an attorney with Zilske Law Firm S.C. He assists employers, insurance carriers, and third-party administrators with all phases of worker's compensation, from initial claim handling through formal hearings and appeals. He is a graduate of the University of Wisconsin-Madison and Marquette University Law School, where he served on the *Marquette Law Review*.

Emily G. Loe is an associate at Hale, Skemp, Hanson, Skemp & Sleik in La Crosse, Wisconsin. She currently handles probate, trust administration, estate planning, and elder law matters. She is a graduate of Minnesota State University in Mankato and Marquette University Law School. She previously served as a legislative aide for nearly 10 years in the Wisconsin State Assembly. She has presented to state and local groups on a wide range of matters pertaining to probate, estate planning, and elder law. She is a member of the State Bar of Wisconsin's Board of Governors and a volunteer for Wills for Heroes and the Alzheimer's Association Wisconsin Chapter.

Jack Longert is in private practice with a primary concentration in advocating for disabled and low-income individuals seeking government benefits. He worked as a consultant with the TMG IRIS program in southwestern and south-central Wisconsin until November 2021, and he was executive director of the Wisconsin Pooled and Community Trust organization (WisPACT, Inc.) from May 2007 through November 2010. Mr. Longert has a B.A. and B.S. from the State University of New York at Buffalo and a J.D. from the University of Illinois College of Law (1978). He practiced for more than 20 years in various Legal Aid and Legal Services programs in Wisconsin and North Dakota and also served as an assistant clinical professor at the University of Wisconsin Law School. His practice included the areas of guardianship and protective placement while serving as a staff guardian ad litem and civil commitment defense counsel for the Legal Aid Society of Milwaukee and working with law students to represent patients at the Mendota Mental Health Institute. Mr. Longert also managed the operations of the Men's Drop-In Shelter and related facilities in Madison from 2002 to 2007.

Steven W. Martin is a retired shareholder in the law firm of Reinhart Boerner Van Deuren s.c. in Waukesha. He received his B.A. from the University of Illinois and his J.D. from the University of Wisconsin. He is a member of the State Bar of Wisconsin. Mr. Martin is a coauthor of the State Bar of Wisconsin's *Wisconsin Construction Lien Law Handbook* and *Wisconsin Attorney's Desk Reference*.

Amanda R. Rabe Mayer is the legal projects director at Wisconsin Judicare, Inc. in Wausau, Wisconsin. Her practice includes a variety of areas, including family law, victim rights, and public benefits. Ms. Rabe Mayer supervises a clinic for self-represented divorce litigants and works closely with community agencies in the Judicare service area to provide services to victims and survivors of domestic abuse and sexual assault. She is on the board of the State Bar of Wisconsin's Public Interest Law Section. Before working at Judicare, she worked at a nonprofit in Milwaukee with a focus on family law for low-income and indigent individuals. She received her undergraduate degree in political theory and constitutional democracy from Michigan State University and her law degree from Marquette University Law School in 2012.

Avery J. Mayne is an elder and special needs law attorney and partner at Walny Legal Group LLC, Milwaukee. She received her undergraduate degree from the University of Missouri and her law degree from Marquette University Law School. Ms. Mayne focuses her practice on issues of asset protection, public benefits qualification and appeals, guardianships and protective placements, and financial exploitation of elderly persons and persons with disabilities. She has practiced in the area of guardianships throughout her career, serving as petitioner, advocate counsel, guardian ad litem, and guardian of the estate.

Joseph T. Miotke is a registered patent attorney, patent litigator, and co-chair of the IP Litigation Group at DeWitt LLP, one of Wisconsin's largest law firms. He practices in the intellectual property (IP) area with experience in patent, trademark, copyright, and trade secret matters. He is a frequent author and speaker to international audiences regarding IP licensing, IP monetization, patent litigation, ethics, and other IP-related topics. He earned his B.S. in civil engineering from Marquette University and graduated magna cum laude from Marquette University Law School.

Robert J. Misy was an emeritus member of the State Bar of Wisconsin and was a past chair of the General Practice Section. He received his A.B. from Dartmouth College and LL.B. from Harvard University. The father of a lawyer and the grandfather of two lawyers, he passed away after reviewing earlier drafts of the *Wisconsin Attorney's Desk Reference* chapters on foreclosure.

Robert J. Misy, Jr. is a shareholder at Reinhart Boerner Van Deuren s.c. in Milwaukee. He received his M.B.A. from Vanderbilt University's Owen Graduate School of Management, his J.D. from Vanderbilt University School of Law, and his LL.M. from Georgetown University Law Center. He was previously with the I.R.S. Chief Counsel and is a member of the State Bar of Wisconsin, the California Bar Association, and the District of Columbia Bar Association. A frequent writer and speaker on taxation and ethics, Mr. Misy has presented at continuing education programs in many states and countries.

Brittany S. Ogden is a partner at the Madison office of Quarles & Brady, LLP, and the chair of its Wisconsin offices' Bankruptcy, Restructuring & Creditor's Rights Practice Group. With her commercial litigation and bankruptcy practice in state and federal courts, she focuses on creditor's rights work, regularly representing financial institutions, equipment finance companies, secured and unsecured creditors, loan servicers, trustees, and creditor committees. She is commonly involved with Chapter 7, 11, 12, and 13 bankruptcy proceedings and receiverships, including cases under [Wis. Stat. ch. 128](#). She routinely represents clients in the agricultural industry. Ms. Ogden obtained her undergraduate degree from the University of Wisconsin-Madison and graduated from the Syracuse University College of Law. She is admitted to practice law in the state of New York, the state of Wisconsin, the U.S. District Court for the Northern District of New York, and the U.S. District Courts for the Eastern and Western Districts of Wisconsin. She is a member of the American Bar Association, the American Bankruptcy Institute, Turnaround Management Association, the International Women's Insolvency and Restructuring Confederation, and the James E. Doyle American Inn of Court. She is an active member of the Equipment

Leasing and Finance Association, serving as a co-chair for its Amicus Brief Committee and a member of its Service Provider's Committee.

Chinonso I. Osuji is an attorney in Reinhart Boerner Van Deuren s.c.'s employee benefits and institutional investor services practices. She advises clients on an array of fiduciary, investment, and real estate matters, including commercial real estate acquisitions, leasing, and financing. Ms. Osuji was a summer associate at Reinhart in 2018 and 2019. During law school, she served as a research assistant at Marquette University Law School for multiple professors and volunteered at the Marquette Volunteer Legal Clinic and Legal Action of Wisconsin's U-Visa project. She also served as a legal intern for the Marquette Legal Initiative for Nonprofit Corporations. Before law school, she was a congressional intern at the U.S. House of Representatives for the office of Representative Beto O'Rourke.

Pamela M. Ploor is a partner in the Milwaukee office of the law firm of Stafford Rosenbaum LLP. Ms. Ploor has practiced law with a concentration in employment and labor law throughout her career. Ms. Ploor has advised more than 1,000 private- and public-sector employers on federal and Wisconsin Family and Medical Leave Act laws. Besides her current job, Ms. Ploor has practiced law in house at a public company and at another law firm in Milwaukee. She received her undergraduate and law degrees from the University of California at Los Angeles and Harvard University, respectively. Ms. Ploor is a member of the State Bar of Wisconsin.

Eve Dennison Pollock is a 1999 graduate of the University of the Wisconsin Law School and holds a B.A. from Luther College in Decorah, Iowa. She has been in private practice with W.R. Stewart & Associates, S.C. in Madison since 2000. Since 2005, Ms. Dennison Pollock has served on the Dane County contract for guardians ad litem taking cases in minor and adult guardianship, juvenile court matters, and paternity actions. She currently serves as the GAL contract liaison, managing relations between the contract guardians ad litem and the judges and court system, and she maintains a private practice focusing on guardian ad litem work in family and probate courts. Ms. Dennison Pollock served on the board of the State Bar of Wisconsin's Children & the Law Section from 2012 until 2015 and is currently a member of the Family Law and Children & the Law Sections. She has presented on guardian ad litem work in Wisconsin at several conferences, State Bar of Wisconsin seminars, and various trainings.

Heather B. Poster (B.A. with distinction, University of Wisconsin, 1999; J.D. with honors, Marquette Law School, 2002) is a shareholder with the law firm of Becker, Hickey & Poster, S.C., Milwaukee. Her practice focuses on the representation of elderly persons and individuals with special needs in matters such as family law, estate planning, public benefits, and advanced directives and guardianship. Heather is a board member (past-chair, program co-chair) of the Wisconsin Chapter of the National Academy of Elder Law Attorneys. She is an advisor to and the past chair of the State Bar of Wisconsin's Elder Law and Special Needs Section (ELSNS) board. She also serves as the ELSNS liaison to the board for WisPACT, Inc., a nonprofit organization that oversees pooled and community trusts for persons with disabilities. For more than 10 years, Ms. Poster has been a coauthor of the Medicaid divestment chapter of the *Wisconsin Attorney's Desk Reference* and the Medicaid chapter of *Advising Older Clients and Their Families*, both published by the State Bar of Wisconsin.

Roy L. Prange, Jr. is a retired partner who practiced in the Madison office of Quarles & Brady, LLP. He received his B.A. from the University of Iowa, his M.A. from The Ohio State University, and his J.D. from the University of Wisconsin. Mr. Prange has lectured at the University of Wisconsin Law School and State Bar of Wisconsin seminars and has also given presentations to various credit groups. He is a member of the State Bar of Wisconsin, a Fellow in the American College of Bankruptcy, and former director and chair of the Bankruptcy, Insolvency & Creditors' Rights Section of the State Bar of Wisconsin.

Amanda Ramaker is an assistant corporation counsel in the Dane County Corporation Counsel's Office. She handles CHIPS, termination of parental rights, and [Wis. Stat.](#) chapter 48 guardianship cases.

Eliza M. Reyes is an attorney in the Madison office of Steinhilber Swanson LLP. Since 2005, her practice has focused on financial matters, primarily representation of debtors, creditors, trustees, landlords, tenants, investors, and other parties in interest with issues before the bankruptcy, federal, and state courts, including individual and commercial bankruptcy filings under Chapters 7, 13, 12, and 11; objections to discharge; fraudulent transfer issues; asset valuation issues; adversary proceedings; defense of foreclosure actions; debt collection; contract disputes; real estate matters; and individual, agricultural and commercial reorganizations. She is a member of the State Bar of Wisconsin's Bankruptcy, Insolvency & Creditors' Rights Section and Solo/Small Firm and General Practice Section. Ms. Reyes has also been a presenter at conferences on various topics related to financial matters and bankruptcy and is an author for two State Bar of Wisconsin publications: the Creditor/Debtor chapter of the *Wisconsin Attorney's Desk Reference* and the Creditors' Rights & Remedies chapter of *Marital Property Law & Practice in Wisconsin*. Ms. Reyes is a 1991 graduate of the University of Wisconsin-Milwaukee with a degree in mass communication/journalism, and she received her J.D. from the John Marshall Law School in 1997.

Theresa L. Roetter is a partner at DeWitt LLP in Madison. She has practiced law in Madison since 1999 and began her legal career in Green and Lafayette Counties. She received her B.A. from St. Norbert College, with honors, in 1988 and her J.D. from Marquette University in 1993. Ms. Roetter focuses her practice on adoption, surrogacy, guardianship, and other family law matters related to children. She has served as counsel in hundreds of adoptions and is a fellow, past board member, and past vice president of the Academy of Adoption and Assisted Reproduction Attorneys. In 2012, Ms. Roetter received the governor's "Champion of Adoption" award and was named an "Angel in Adoption" by the Congressional Coalition on Adoption Institute in Washington, D.C. She is an active member of the State Bar of Wisconsin, serving the Children & the Law Section on its legislative committee, and as a former board member and past section chair.

Patrick M. Roney is a partner at the Milwaukee firm of Roney & Knupp, LLC. He received his B.A. from the University of Wisconsin-Milwaukee in 2000, and his J.D. from Marquette University in 2004. He worked as an associate attorney for an insurance defense litigation firm through 2008. In 2009, he started his own real estate and general litigation firm. He has been practicing landlord-tenant law since 2009.

Kyle R. Schaffer is a partner at Willow River Law, LLC, and a member of the trial and litigation team. He received his J.D. from the University of St. Thomas School of Law in Minneapolis, Minnesota, and was admitted to practice law in Wisconsin in 2016. Mr. Schaffer practices primarily in family law, construction law, and civil litigation. His family practice involves divorce and postdivorce matters, custody disputes, and paternity actions. He is an active member of the State Bar of Wisconsin, the St. Croix Valley Bar Association, and the American Legion Butler-Harmon Post 80. Mr. Schaffer, a veteran of the war in Afghanistan, also enjoys serving his community and his country as an infantry company commander in the Wisconsin Army National Guard.

Timothy G. Schally is a partner with and chair of the Tax Practice Group of Michael Best & Friedrich LLP. He received his law degree from the University of Wisconsin Law School in 1985. He is a former chair of the State Bar of Wisconsin's Taxation Law Section and has lectured and written on a wide variety of tax subjects, including income, property, sales, and use taxes. His publications include *Tax Consequences of Contingent Payment Transactions* and *The Complete Guide to Wisconsin Sales and Use Taxes*. He has also served as an adjunct faculty member in tax law at the University of Wisconsin Law School, where he taught courses in the federal income taxation of corporations.

Madeline Schlederer is an associate in the Milwaukee office of Godfrey & Kahn, S.C. She received her bachelor's degree from the Purdue University in 2013, majoring in civil engineering. Ms. Schlederer received her J.D. from Indiana University College of Law in 2017. She has experience in intellectual property prosecution and litigation, particularly with respect to copyrights, patents, trademarks, privacy and rights of publicity, and unfair competition.

Megan L. Sprecher (she/her/hers) is a graduate of Indiana University-Bloomington and the University of St. Thomas School of Law. She is a staff attorney with Legal Action of Wisconsin, where she works on barriers to employment issues. Before joining Legal Action, Ms. Sprecher was the Immigration and Poverty Law Attorney at End Domestic Abuse Wisconsin, the Wisconsin Coalition Against Domestic Violence, and a Senior Attorney for the Legal Aid Society of Cleveland. She serves on the Department of Children and Families' Domestic Violence Taskforce and the Wisconsin Court System's Committee to Improve Interpreting and Translation in the Wisconsin Courts.

Gary S. Stanislawski is the president of Zilske Law Firm S.C. in Brookfield, Wisconsin. He received his B.A., in 1994, and his J.D., in 1997, from Marquette University. His practice concentrates on defending worker's compensation claims and advising clients on related issues. He is a member of the Defense Research Institute and the College of Workers' Compensation Lawyers.

John C. Talis is an assistant corporation counsel for Dane County. From 1991 to 2001, he was in private practice. He has been an assistant corporation counsel for Dane County since 2001, where he has been responsible for numerous CHIPS, termination of parental rights, and guardianship cases. He is a member of the State Bar of Wisconsin's Children & the Law Section.

Lawrence Alan Towers is in private practice in Milwaukee. He was formerly a law professor at Marquette University Law School, where he taught civil procedure and trial-related courses. He received his A.B. from Kenyon College in 1974, his M.P.A. from California State University in 1978, and his J.D. from Hastings College of the Law in 1981. He has given presentations and written extensively on the subject of automobile warranty law, authored several amicus curiae briefs, and represented the successful appellants in *Vultaggio v. General Motors Corp.*, 145 Wis. 2d 874 (Ct. App. 1988), and *Dobbratz v. PACCAR, Inc.*, 2002 WI App 138, 256 Wis. 2d 205.

Clementine Uwabera is a senior associate attorney with the Madison law firm of Stafford Rosenbaum LLP. She received her undergraduate degree from University of Wisconsin and her law degree from Florida State University. Ms. Uwabera concentrates her practice in the areas of litigation and municipal law. Ms. Uwabera serves as the membership co-chair of the Dane County Bar Association.

Heidi Acker Yelk is the deputy law librarian and director of reference services at the Wisconsin State Law Library. Before joining the Wisconsin State Law Library, she worked as a law firm librarian. She received her B.A. from the University of Wisconsin and her master's degree in library and information science from the University of Wisconsin-Milwaukee. Ms. Yelk has served as a member of the State Bar of Wisconsin's Staff-Client Education Committee. She is a frequent contributor to *Legal Information Alert* and writes extensively on computer-assisted legal research.

Peter M. Young is a shareholder at Habush Habush & Rottier S.C.®, where he represents injured people and their loved ones. He has tried cases throughout Wisconsin and has represented people throughout the United States. He practices in the areas of personal injury, product liability, and nursing home negligence. He graduated from the University of Wisconsin-Madison with degrees in legal studies and political science and earned a J.D. from Marquette University Law School.

The following authors have contributed to this book in the past:

Betsy J. Abramson

Thomas W. Anderson

Gary L. Bakke

Carol Bannon

Virginia M. Bartelt

Thomas J. Basting, Sr.

Barbara J. Becker

Maren Beermann

Cyrus Behroozi

Eugenia G. Carter

Stacia Conneely

Anne Daugherty-Leiter

Kevin J. Demet

Margadette Demet

Thomas E. Dixon, Jr.

Kevin R. Du

William Ebbott

Jerome M. Elliott

Jon Evenson

Navid Fanaeian

Kelly S. Fisher

Stephen M. Glynn

Charles P. Graupner

Ann Green

Dyann Hafner

Robert Horowitz

John L. Horwich

Mark Hoskins

Susan Howe Rauti

Kerry L. Gabrielson

Sara Berman Jensen

Gregory G. Johnson

Mary Kasperek

Jessica King

Karl L. Kliminski

Grace Knutson

Deanne M. Koll.

Katharine F. Kucharski

Saejung Lee

Autumn L. Lindquist

Mary Ann McCarthy

James W. McNeilly, Jr.

Tess Meuer

John C. Mitby

Sally Mohr Lunde

Teresa A. Mueller

John D. Neal

Barbara A. Neider

Lori Nitzel

Angela R. Olson

Boris V. Ouchakof

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Daphne Webb

Rebecca R. Weise

William S. Wood

Shannon E. Wynn

Jodi S. Yin

Siv I. Yurichuk

Robert H. Zilske

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How to Use This Book

This book is a practical resource for attorneys. It can be used as a refresher resource or as a preliminary reference for approaching specific procedures that may be unfamiliar. It is not an exhaustive treatise, and it does not cover all legal procedures.

The directors of the State Bar's General Practice Section selected the original topics based on the directors' views of the general practice lawyer's need. However, some areas of the law that are of interest to the general practice lawyer, such as civil litigation, are too multifaceted to be synthesized in a brief outline or are sufficiently explained in other State Bar of Wisconsin publications. From time to time, new topics are added to the book and outlines are expanded.

The book covers 10 major subject areas, which are further divided into chapters, and 1 "miscellaneous" grouping of chapters. All chapters appear in outline form and begin with an introductory section that gives the scope of the chapter and suggests additional resources. For the user's convenience, a condensed chapter outline—a mini table of contents—precedes most introductory sections.

The chapters provide substantive information, but the emphasis is on procedure. The text offers definitions, procedural steps, and examples. Citations to statutes, cases, and other authorities follow the related text.

Every effort has been made to ensure the accuracy of the suggested procedures and citations; nevertheless, this book must be used with caution. Although the *Desk Reference* is updated annually, good practice demands that users research pertinent case law, confirm current versions of statutes, and use current versions of forms.

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Chapter 1

Fair Employment Act

Drew Cochrane

New Glarus Brewing Company

New Glarus

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 191; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Feb. 2022, No. 794, and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-102 (Mar. 15, 2022).

I. INTRODUCTION [§ 1.1]

A. In General [§ 1.2]

1. The Wisconsin Fair Employment Act (WFEA), [Wis. Stat.](#) §§ 111.31 through 111.395, prohibits employment discrimination on basis of:
 - a. Age, *see infra* § [1.9](#);
 - b. Arrest or conviction record, *see infra* § [1.10](#);
 - c. Creed, *see infra* § [1.11](#);
 - d. Disability, *see infra* § [1.12](#);
 - e. Marital status, *see infra* § [1.14](#);
 - f. Military service, *see infra* § [1.15](#);
 - g. National origin/ancestry, *see infra* § [1.16](#);
 - h. Race, *see infra* § [1.17](#);
 - i. Sex (including sexual harassment), *see infra* § [1.18](#);
 - j. Sexual orientation, *see infra* § [1.19](#);
 - k. Use or nonuse of lawful products off the employer's premises during nonworking hours, *see infra* § [1.20](#);
 - l. Declining to attend a meeting or participate in any communication about religion or political matters, *see infra* § [1.21](#); and
 - m. Refusing an employer's request to grant access or allow observation of a personal internet account, *see infra* § [1.22](#).
2. The WFEA prohibits unfair honesty testing. [Wis. Stat.](#) §§ 111.37, 111.32(14), *see infra* § [1.13](#).
3. The WFEA prohibits unfair genetic testing. [Wis. Stat.](#) § 111.372.
4. Proceedings under other laws (e.g., federal law, Title VII, Americans with Disabilities Act) may have claim preclusion/res judicata effect on WFEA claims. *Schaeffer v. Personnel Comm'n*, 150 Wis. 2d 132 (Ct. App. 1989). *But see Aldrich v. LIRC*, 2008 WI App 63, 310 Wis. 2d 796.
5. Federal law, and not the WFEA, controls regulation of personnel criteria for National Guard. *Hazelton v. Personnel Comm'n*, 178 Wis. 2d 776 (Ct. App. 1993).

6. Except for claims of discrimination based on acts occurring between July 1, 2009 and April 19, 2012, the WFEA does not include a private right of action. *Fry v. Ascension Health Ministry Servs.*, No. 18-CV-1573, 2019 WL 1320320, at *4 (E.D. Wis. Mar. 22, 2019) (unpublished).
7. When the WFEA has created a new right, the WFEA is the exclusive remedy; however, when independent torts preexisted the WFEA, independent claims may be brought. *Becker v. Automatic Garage Door Co.*, 156 Wis. 2d 409 (Ct. App. 1990).

NOTE: This outline covers the prohibited bases of discrimination and procedure under the WFEA, but it does not cover in detail topics of substantive law and methods of proof.

B. Other Sources [§ 1.3]

1. Peter L. Albrecht et al., [Wisconsin Employment Law](#) (State Bar of Wis. 7th ed. 2018–19 & Supp.).
2. Rose Ann Wasserman, [A Guide to Wisconsin Employment Discrimination Law](#) (State Bar of Wis. 7th ed. 2019–20 & Supp.).
3. *Equal Rights Decision Digest* for Fair Employment Act decisions available from:
 - a. Department of Workforce Development (DWD), Equal Rights Division (ERD), 201 E. Washington Ave., Madison, WI 53703; and
 - b. Labor and Industry Review Commission (LIRC), *Equal Rights*, https://lirc.wisconsin.gov/equal_rights.htm (last visited Mar. 14, 2022).
4. ERD decisions at Milwaukee and Madison ERD offices and final agency decisions at the LIRC in Madison or at Wisconsin State Law Library.
5. Personnel Commission (PC) decisions are available on the Wisconsin Employment Relations Commission (WERC) website (the PC was abolished in 2003, and the WERC is now responsible for personnel appeals). See WERC, *State Civil Service Appeals Decisions*, <http://werc.wi.gov/state-civil-service-appeals-linked-lists/> (last visited Mar. 14, 2022).
6. Fair Employment Practices Cases (BNA) and Employment Practices Decisions (CCH).
7. Michael S. Heffernan, [Appellate Practice and Procedure in Wisconsin](#) (State Bar of Wis. 9th ed. 2022) (regarding judicial review and appeal).

II. COVERAGE [§ 1.4]

A. Persons Prohibited from Discriminating [§ 1.5]

1. Employers, including religious organizations when the job position is not closely linked to the religious mission of a religious organization but excluding social club or fraternal society seeking to employ member when job is advertised only within membership. [Wis. Stat.](#) §§ 111.321, 111.325, 111.32(6)(b); *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, 320 Wis. 2d 275.

2. Employment agencies. [Wis. Stat.](#) § 111.321.
3. Labor organizations. [Wis. Stat.](#) §§ 111.321, 111.325.
4. Licensing agencies. [Wis. Stat.](#) §§ 111.321, 111.325.
5. State agencies. [Wis. Stat.](#) § 111.375(2).
6. Other persons. [Wis. Stat.](#) §§ 111.321, 111.325.

B. Persons Protected [§ 1.6]

1. Employees (except individuals employed by parents, spouse, or child). [Wis. Stat.](#) §§ 111.32(5), 111.322, 111.325.
2. Applicants for employment or licensing. [Wis. Stat.](#) §§ 111.325, 111.322.

C. Prohibited Acts [§ 1.7]

1. Refusing to hire, employ, admit, or license on the basis of discrimination identified under [Wis. Stat.](#) § 111.321 or on the basis of sexual orientation. [Wis. Stat.](#) §§ 111.322(1), 111.36(1)(d)1.
2. Terminating or barring from employment or labor-organization membership for any reason termed discriminatory under [Wis. Stat.](#) § 111.321 or on the basis of sexual orientation. [Wis. Stat.](#) §§ 111.322(1), 111.36(1)(d)1.

Discriminating in promotion, compensation, labor-organization membership, or terms, conditions, or privileges of employment under [Wis. Stat.](#) § 111.321 or on the basis of sexual orientation. [Wis. Stat.](#) §§ 111.322(1), 111.36(1)(a), (d)1.

3. Printing or circulating statement or advertisement, using application, or making pre-employment inquiry that implies or expresses any prohibited discrimination. [Wis. Stat.](#) § 111.322(2); *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567 (Ct. App. 1991).
4. Retaliating
 - a. Because individual files a complaint, [Wis. Stat.](#) § 111.322(2m)(a), (bm);
 - b. Because individual attempts to enforce a right under the statutory provisions listed in C.6., *infra*, [Wis. Stat.](#) § 111.322(2m)(b), (bm);
 - c. Because individual testifies or assists in any action or proceeding under or to enforce any right under the statutory provisions listed in C.6., *infra*, [Wis. Stat.](#) § 111.322(2m)(b), (bm); or
 - d. Because an employer believes the individual will do any of the above, [Wis. Stat.](#) § 111.322(2m)(d).
5. Complaint, right, testimony, or belief must arise in connection with proceeding under [Wis. Stat.](#) §§ 103.02 (hours of labor), 103.10 (Family or Medical Leave Act), 103.11 (bone marrow and

organ donation leave), 103.13 (employee records), 103.28 (employment of minors), 103.32 (recovery of wage arrearage), 103.34 (traveling sales crews), 103.455 (deductions for faulty work, theft, etc.), 104.12 (minimum-wage law), 109.03 (when wages payable), 109.07 (advance notice for plant closing or mass layoff), 109.075 (advance notice of health-care-benefit cessation), 146.997 (health-care worker protection), 101.58–.599 (employee’s right-to-know law), 103.64–.82 (employment of minors), or 995.55 (internet privacy protection).

III. PROHIBITED BASES OF DISCRIMINATION [§ 1.8]

A. Age [§ 1.9]

1. Persons age 40 and older are protected. [Wis. Stat.](#) § 111.33(1).
2. Exceptions for
 - a. Firing a person who is unable to perform duties, even if that person could perform the job with some sort of accommodation. [Wis. Stat.](#) § 111.33(2)(a); *Harrison v. LIRC*, 211 Wis. 2d 681 (Ct. App. 1997).

NOTE: Employer, of course, may still be subject to disability-discrimination claim for failure to accommodate.
 - b. Implementing a retirement plan that is not subterfuge for age discrimination or used to require involuntary retirement. [Wis. Stat.](#) § 111.33(2)(b).
 - c. Varying insurance coverage according to employee’s age. [Wis. Stat.](#) § 111.33(2)(d).
 - d. Exercising an age distinction in hiring if knowledge and experience to be gained is required for future advancement to managerial or executive position. [Wis. Stat.](#) § 111.33(2)(e).
 - e. Exercising an age distinction for employee exposed to physical danger or hazard, even absent a showing that employer has consistently considered age a relevant factor in past job decisions. [Wis. Stat.](#) § 111.33(2)(f); *Johnson v. LIRC*, 200 Wis. 2d 715 (Ct. App. 1996).
 - f. Exercising an age distinction for a school-bus driver more than 70 years of age. [Wis. Stat.](#) §§ 111.33(2)(g), 343.12(2)(a), (3).

B. Arrest or Conviction Record [§ 1.10]

1. Definitions
 - a. *Arrest record* includes information about being questioned, apprehended, detained, arrested, charged, or tried for any felony, misdemeanor, or other offense. [Wis. Stat.](#) § 111.32(1).
 - b. *Conviction record* includes information about conviction of felony or misdemeanor, delinquency adjudication, less-than-honorable discharge, placement on probation, fine,

imprisonment, placement on extended supervision, or parole by law enforcement or military authority. [Wis. Stat.](#) § 111.32(3).

2. Prohibited acts
 - a. Discriminating because of arrest or conviction record. [Wis. Stat.](#) §§ 111.31, 111.321.
 - b. Requesting information regarding arrest record except a record of pending charge. [Wis. Stat.](#) § 111.335(2)(a).
3. Exceptions
 - a. Per [Wis. Stat.](#) § 111.335(2)(b), (3)(a)1. and subject to (4), refusing to hire or license or terminating employment or license when
 - (1) Individual is subject to pending criminal charge or convicted of offense, and
 - (2) Circumstances of charge or offense substantially relate to circumstances of job or license. *See Milwaukee Cnty. v. LIRC*, 139 Wis. 2d 805 (1987).
 - (a) A licensing agency must not refuse to license an individual or suspend an existing license based on a substantially related pending criminal charge unless the charge is one of certain specified crimes against a child or life and bodily security, or a violent crime against a child. [Wis. Stat.](#) § 111.335(4)(a).
 - (b) A licensing agency must not refuse to license an individual, or bar or terminate an individual from licensing, because the individual was adjudicated delinquent of an offense under the Juvenile Justice Code, unless the offense was one of certain specified crimes against a child or life and bodily security. [Wis. Stat.](#) § 111.335(4)(b).
 - (c) Except in the case of certain exempt offenses, a licensing agency that denies or terminates a license based on a prior conviction must state in writing its reasons for doing so and allow the individual to show evidence of rehabilitation and fitness to engage in the licensed activity. [Wis. Stat.](#) § 111.335(4)(c), (d).
 - (d) An individual may obtain a predetermination from a state licensing agency regarding whether the individual would be disqualified from obtaining a license based on a prior conviction before submitting a full license application. [Wis. Stat.](#) § 111.335(4)(f).
 - b. Per [Wis. Stat.](#) § 111.335(2)(a), requesting information regarding arrest record when
 - (1) Bond is required by law, regulation, or employer's established business practice, and
 - (2) Individual may not be bondable because of the person's arrest record.
 - c. Per [Wis. Stat.](#) § 111.335(3)(a)2., refusing to hire or license on the basis of conviction record when

- (1) Individual is not bondable, and
 - (2) Bond is required by law, regulation, or employer's established business practice.
- d. Denying, revoking, or refusing to renew a license or permit under [Wis. Stat.](#) § 440.26 to a felon who has not been pardoned, or refusing to employ an unpardoned felon in a business licensed under [Wis. Stat.](#) § 440.26. [Wis. Stat.](#) § 111.335(3)(b).
 - e. Refusing to employ as a burglar-alarm installer a felon who has not been pardoned. [Wis. Stat.](#) § 111.335(3)(c).
 - f. Refusing to employ in the classified service any person who has been convicted under federal law for refusing to register with the selective service and who has not been pardoned. [Wis. Stat.](#) § 111.335(3)(d).
 - g. Refusing to employ or terminating from employment at an educational agency an individual who has been convicted of a felony and who has not been pardoned. [Wis. Stat.](#) § 111.335(3)(e).

NOTE. An *educational agency* is defined as a school district, cooperative educational service agency, private school, charter school, or other listed institutions or agencies. [Wis. Stat.](#) § 111.335(1m)(a).

- h. Refusing to hire or license or terminating employment or license because of conviction record when individual has been convicted of knowingly using or claiming to have a fake academic credential pursuant to [Wis. Stat.](#) § 440.52(13)(c). [Wis. Stat.](#) § 111.335(3)(f).
 - i. Per [Wis. Stat.](#) § 111.335(3)(f), for the board of nursing, in accordance with [Wis. Stat.](#) § 441.51(3)(c)7. and 8., refusing to license an individual who has
 - (1) Been convicted or found guilty, or has entered into an agreed disposition, of a felony offense under applicable state or federal criminal law, or
 - (2) Been convicted or found guilty, or has entered into an agreed disposition, of a misdemeanor offense related to the practice of nursing as determined on a case-by-case basis.
4. Employers have no affirmative duty to accommodate individuals with conviction records. *Knight v. LIRC*, 220 Wis. 2d 137 (Ct. App. 1998).

NOTE: Presumably, this rule would apply with equal force to persons with arrest records, but this issue has not yet been litigated in Wisconsin.

C. Creed [§ 1.11]

1. *Creed* means a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views. [Wis. Stat.](#) § 111.32(3m).

2. Creed discrimination includes refusing to reasonably accommodate a religious observance or practice of employee or prospective employee unless employer demonstrates that the accommodation would pose undue hardship on employer's program, enterprise, or business. [Wis. Stat.](#) § 111.337(1).
3. Exceptions
 - a. Nonprofit religious organization or entity primarily owned or controlled by such organization may give preference to member of the same or similar religious denomination. [Wis. Stat.](#) § 111.337(2)(a).
 - b. Nonprofit religious association or entity primarily owned or controlled by such association may give preference to prospective employee or employee who adheres to the association's creed if the job description demonstrates position is clearly related to religious teachings and beliefs of religious association. [Wis. Stat.](#) § 111.337(2)(am).
 - c. Fraternal organizations under [Wis. Stat.](#) § 614.01(1)(a) may give preference to member, or one eligible for membership, in hiring or promoting to officer, administrator, or salesperson. [Wis. Stat.](#) § 111.337(2)(b).
 - d. Religious employers may not use a religious preference when such preference is a pretext for a prohibited form of discrimination. *Sacred Heart Sch. Bd. v. LIRC*, 157 Wis. 2d 638 (Ct. App. 1990).
4. Counties and municipalities may not adopt creed-discrimination provisions more restrictive than the WFEA's. [Wis. Stat.](#) § 111.337(3).

D. Disability [§ 1.12]

1. *Disabled individual* includes one who has, has a record of having, or is perceived as having a physical or mental impairment that makes achievement unusually difficult or limits the person's capacity to work. [Wis. Stat.](#) § 111.32(8); *Hutchinson Tech., Inc. v. LIRC*, 2004 WI 90, 273 Wis. 2d 394; *City of La Crosse Police & Fire Comm'n v. LIRC*, 139 Wis. 2d 740 (1987); *Brown Cnty. v. LIRC*, 124 Wis. 2d 560, 569 (1985); *American Motors Corp. v. LIRC*, 119 Wis. 2d 706 (1984); *Doepke-Kline v. LIRC*, 2005 WI App 209, 287 Wis. 2d 337.
2. Impairment must be permanent. *Erickson v. LIRC*, 2005 WI App 208, ¶ 16, 287 Wis. 2d 204.
3. Disability-discrimination claim is not barred by the exclusivity provision of the Worker's Compensation Act. *See Byers v. LIRC*, 208 Wis. 2d 388 (1997).
4. Disability discrimination includes but is not limited to
 - a. Contributing less to employee's fringe benefits, including insurance, because of employee's disability. [Wis. Stat.](#) § 111.34(1)(a).
 - b. Refusing to reasonably accommodate employee's or prospective employee's disability unless employer demonstrates that accommodation would pose hardship on employer's program, enterprise, or business. [Wis. Stat.](#) § 111.34(1)(b); *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 264 Wis. 2d 200, *abrogated on other grounds by Tetra Tech EC*,

Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, 382 Wis. 2d 496; *McMullen v. LIRC*, 148 Wis. 2d 270 (Ct. App. 1988).

- (1) Reasonable accommodation may require giving an employee clemency or temporary forbearance from enforcement of an otherwise nondiscriminatory work policy. *Stoughton Trailers v. LIRC*, 2007 WI 105, 303 Wis. 2d 514; *Target Stores v. LIRC*, 217 Wis. 2d 1 (Ct. App. 1998).
- (2) A change in job duties may be a reasonable accommodation in a given circumstance. *Crystal Lake Cheese Factory*, 2003 WI 106, 264 Wis. 2d 200.
- (3) A change in hours worked per shift may be a reasonable accommodation in a given circumstance, even when those hours are mandatory for all employees. *Hutchinson Tech.*, 2004 WI 90, 273 Wis. 2d 394.
- (4) If employee can perform some or most of the job duties, reassigning those duties the employee cannot perform may be a reasonable accommodation. *Hutchinson Tech.*, 2004 WI 90, 273 Wis. 2d 394; *Crystal Lake Cheese Factory*, 2003 WI 106, 264 Wis. 2d 200.
- (5) Duty of reasonable accommodation may change in nature and degree based on information regarding employee's disability, because such information is also subject to change. *Hutchinson Tech.*, 2004 WI 90, 273 Wis. 2d 394.

5. Exceptions

- a. May consider whether disability is reasonably related to individual's ability to adequately undertake job-related responsibilities. [Wis. Stat.](#) § 111.34(2)(a).
- b. May consider present and future safety of individual, coworkers, and general public in evaluating whether individual can adequately undertake job-related responsibilities; this requires a case-by-case evaluation. [Wis. Stat.](#) § 111.34(2)(b); *Samens v. LIRC*, 117 Wis. 2d 646 (1984).
- c. May consider special duty of care for safety of general public in evaluating whether individual can adequately undertake job-related responsibilities; this requires a case-by-case evaluation. [Wis. Stat.](#) § 111.34(2)(c); *Boynton Cab Co. v. DILHR*, 96 Wis. 2d 396, 416–19 (1980).

E. Honesty Testing [§ 1.13]

1. *Lie detector* includes polygraphs, deceptographs, voice-stress analysis, psychological-stress evaluations, and similar tests for honesty. [Wis. Stat.](#) § 111.37(1)(b).
2. Honesty testing does not include paper-and-pencil tests that do not measure the subject's physiological responses during test. *Pluskota v. Roadrunner Freight Sys., Inc.*, 188 Wis. 2d 288 (Ct. App. 1994).
3. Employer or agent may not require, request, suggest, or cause employee or prospective employee to take or submit to lie detector test or use, accept, refer to, or inquire about lie detector test results. [Wis. Stat.](#) § 111.37(1)(a), (2)(a), (b).

4. Employer or agent may not discipline, discharge, discriminate against, deny employment or promotion to, or threaten to take these actions against an employee or applicant who refuses, declines, or fails to take a lie detector test nor may an employer or agent take any of these actions or threaten to do so because of the result of an employee's lie detector test. [Wis. Stat. § 111.37\(2\)\(c\)](#).
5. Exceptions
 - a. Tests administered in connection with ongoing investigation involving economic loss or injury to employer's business if (1) employee had access to property that is subject of investigation; (2) employer has reasonable suspicion that employee was involved; (3) employer executes a signed statement, provided to examinee before the test, specifically stating the incident or activity being investigated and the basis for testing particular employees; and (4) statement identifies the specific loss or injury at issue, indicating that the employee had access to the property at issue, and describing the basis for reasonable suspicion; this document must be kept by the employer for at least three years. [Wis. Stat. § 111.37\(5\)\(a\)](#).
 - b. Tests administered to security personnel if employer protects facilities with an impact on public health, safety, or welfare; currency, securities, precious commodities, or instruments; or propriety information. [Wis. Stat. § 111.37\(5\)\(b\)](#).
 - c. Tests administered to prospective employees who will have direct access to the manufacture, storage, distribution, or sale of controlled substances or to current employees accused of misconduct involving loss or injury to businesses that manufacture, distribute, or dispense controlled substances. [Wis. Stat. § 111.37\(5\)\(c\)](#).
 - d. Tests administered to prospective employees of Wisconsin law enforcement agencies. [Wis. Stat. § 111.37\(5\)\(bm\)](#).
6. Required procedure for giving permitted tests
 - a. Inform examinee orally and in writing of rights under the WFEA and [Wis. Stat. §§ 905.065 \(Evidence - Privileges\) and 942.06 \(Crimes Against Reputation, Privacy and Civil Liberties\)](#). [Wis. Stat. § 111.37\(6\)\(c\)2](#). (Use of honesty testing devices in employment situations).
 - b. Present written test questions before test. [Wis. Stat. § 111.37\(6\)\(c\)3](#).
 - c. Permit examinee to end the test at any time. [Wis. Stat. § 111.37\(6\)\(c\)1](#).
 - d. The test must not last for less than 90 minutes. [Wis. Stat. § 111.37\(6\)\(c\)5](#).
 - e. Ask no questions regarding topics listed in [Wis. Stat. § 111.37\(6\)\(c\)1](#).
 - (1) Beliefs or opinions on racial matters,
 - (2) Religious affiliation or beliefs,
 - (3) Sexual behavior,

- (4) Political affiliation or beliefs, or
 - (5) Labor-union activities.
7. Per [Wis. Stat.](#) § 111.37(6), disciplinary action, hiring, or firing may not be based solely on
 - a. Results of permitted test unless independently obtained relevant evidence or information tends to support the test results, or
 - b. Refusal to take tests.
 8. Employers must post the DWD-approved notice setting forth employees' rights and protection. [Wis. Stat.](#) § 111.37(3).

F. Marital Status [§ 1.14]

1. *Marital status* means the status of being married, single, divorced, separated, or widowed. [Wis. Stat.](#) § 111.32(12).
2. Exception exists for prohibiting individual from directly supervising or being supervised by spouse. [Wis. Stat.](#) § 111.345.
3. Employers may provide more extensive health insurance to married employees than to single employees but may not refuse insurance to persons covered by spouse's insurance. *Phillips v. Personnel Comm'n*, 167 Wis. 2d 205 (Ct. App. 1992); *Braatz v. LIRC*, 168 Wis. 2d 124 (Ct. App. 1992), *aff'd*, 174 Wis. 2d 286 (1993).
4. Public employers may limit their married coemployees to coverage under one family health-insurance policy because of their marital status. *Motola v. LIRC*, 219 Wis. 2d 588 (1998); *Kozich v. Employe Tr. Funds Bd.*, 203 Wis. 2d 363 (Ct. App. 1996).
5. Discrimination on the basis of the identity of an employee's spouse is *not* discrimination on the basis of marital status prohibited by the WFEA. *Bammert v. LIRC*, 2000 WI App 28, 232 Wis. 2d 365.

G. Military Service [§ 1.15]

1. *Military service* means service in the U.S. armed forces, the state defense force, the national guard of any state, or any other reserve component of the U.S. armed forces. [Wis. Stat.](#) § 111.32(12g).
2. An employer, labor organization, licensing agency, employment agency, or other person who engages in prohibited activity under this section is a covered entity. [Wis. Stat.](#) § 111.355(1).
3. It is unlawful to refuse to hire, employ, admit, or license an individual, to bar or terminate an individual from employment, membership, or licensure, or to discriminate against an individual in promotion, compensation, or the terms, conditions, or privileges of employment because of an individual's potential, current, future, or past military service. [Wis. Stat.](#) § 111.355(1).

4. It is not unlawful if the alleged discriminatory action is taken because the individual has been discharged from military service under a bad-conduct, dishonorable, or other-than-honorable discharge, or under an entry-level separation, and the circumstances of the discharge or separation substantially relate to the circumstance of the particular job or licensed activity. [Wis. Stat.](#) § 111.355(2).

H. National Origin/Ancestry [§ 1.16]

National origin and *ancestry* are synonymous, referring to the country of a person's ancestors' birth. 8 [U.S.C.](#) § 1324b(a)(1); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88–89 (1973).

I. Race [§ 1.17]

See Watkins v. DILHR, 69 Wis. 2d 782 (1975) (holding that employee, who was denied kind of job desired and for which employee deemed herself qualified, was entitled to know whether this was because of racial discrimination or some other cause, even though employee was later given job she had allegedly been refused on racial grounds).

J. Sex [§ 1.18]

1. Definitions

- a. Sex is bona fide occupational qualification if all members of one sex are physically incapable of performing essential job duties, or if the essence of employer's business would be undermined if employees were not hired exclusively from one sex. [Wis. Stat.](#) § 111.36(2).
- b. Per [Wis. Stat.](#) § 111.32(13), *sexual harassment* means:
 - (1) Unwelcome sexual advances;
 - (2) Unwelcome requests for sexual favors;
 - (3) Unwelcome physical contact of a sexual nature;
 - (4) Unwelcome verbal or physical conduct of a sexual nature, including:
 - (a) Deliberate, repeated, unsolicited gestures or comments of a sexual nature, or
 - (b) Deliberate verbal or physical conduct of a sexual nature, whether repeated or not, that is sufficiently severe to substantially interfere with work performance or to create an intimidating, hostile, or offensive work environment, or
 - (c) Deliberate, repeated display of offensive, sexually graphic materials not necessary for business purposes; and
 - (5) Includes conduct directed by a person at another person of the same or opposite gender.

2. Prohibited acts

- a. Discriminating in promotion, in compensation for equal or substantially similar work, or in terms, conditions, or privileges of employment or licensing based on sex, if sex is not a bona fide occupational qualification. [Wis. Stat.](#) § 111.36(1)(a).
 - b. Engaging in sexual harassment. [Wis. Stat.](#) § 111.36(1)(b).
 - c. Implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment. [Wis. Stat.](#) § 111.36(1)(b).
 - d. Implicitly or explicitly making or permitting acquiescence in, submission to, or rejection of sexual harassment the basis of any employment decision, other than disciplinary action against employee engaging in sexual harassment. [Wis. Stat.](#) § 111.36(1)(b).
 - e. Permitting sexual harassment to have the purpose or effect of substantially interfering with employee's work performance or of creating an intimidating, hostile, or offensive work environment. [Wis. Stat.](#) § 111.36(1)(b).
 - f. Discriminating against any woman on basis of pregnancy, childbirth, maternity leave, or related medical conditions. [Wis. Stat.](#) § 111.36(1)(c); *Wisconsin Tel. Co. v. DILHR*, 68 Wis. 2d 345 (1975).
 - g. Engaging in harassment that consists of unwelcome verbal or physical conduct directed at a person because of gender and with purpose or effect of creating an intimidating, hostile, or offensive work environment or substantially interfering with that person's work. [Wis. Stat.](#) § 111.36(1)(br).
 - (1) Includes discrimination regarding fringe-benefits program covering illness and disability. *Ray-O-Vac v. DILHR*, 70 Wis. 2d 919 (1975).
 - (2) This form of discrimination is not preempted by the federal Employment Retirement Income Security Act (ERISA), 29 [U.S.C.](#) §§ 1001–1461. *Kimberly-Clark Corp. v. LIRC*, 95 Wis. 2d 558, 567 (Ct. App. 1980).
3. Substantial interference with work performance or creation of intimidating, hostile, or offensive work environment is established if a reasonable person under the same circumstances would consider the conduct to so affect work performance or work environment. [Wis. Stat.](#) § 111.36(1)(br).
 4. To be actionable sexual harassment, conduct complained of must be sufficiently severe or pervasive to alter conditions of employment—unless alleged harasser is employer itself, i.e., “owner or agent” of employer; in such circumstances, allegations of sexually harassing conduct against such owner or agent are sufficient to state claim. *Kannenberg v. LIRC*, 213 Wis. 2d 373 (Ct. App. 1997). *But see Jim Walter Color Separations v. LIRC*, 226 Wis. 2d 334 (Ct. App. 1999).
 5. Per [Wis. Stat.](#) § 111.36(3), an employer, labor organization, employment agency, or licensing agency is presumed liable for an act of sexual harassment, as defined by [Wis. Stat.](#) § 111.32(13), by it, its employees, or its members under the following circumstances:

- a. Act occurs while complaining employee is at place of employment or performing duties relating to employment, *and*
- b. Complaining employee informs employer, labor organization, employment agency, or licensing agency of act, *and*
- c. Employer, labor organization, employment agency, or licensing agency fails to take appropriate action within a reasonable time.

NOTE: For an example of corporate liability for sexual harassment, see *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984).

6. The Worker's Compensation Act is not the exclusive remedy for sex discrimination. *Byers v. LIRC*, 208 Wis. 2d 388 (1997).

K. Sexual Orientation [§ 1.19]

1. Definition of *sexual orientation* per [Wis. Stat.](#) § 111.32(13m):
 - a. Sexual preference, *or*
 - b. History of sexual preference, *or*
 - c. Being identified with a sexual preference.
2. Prohibited acts
 - a. Refusing to hire, employ, admit, or license, or barring from employment, membership, or licensure because of sexual orientation. [Wis. Stat.](#) § 111.36(1)(d)1.
 - b. Discriminating in promotion, compensation, or terms, conditions, or privileges of employment because of sexual orientation. *Id.*
 - c. Retaliating for opposing discriminatory practices related to sexual orientation, for making a complaint, or for testifying or assisting in proceeding under [Wis. Stat.](#) § 111.36(1)(d). [Wis. Stat.](#) § 111.36(1)(d)2.

L. Use or Nonuse of Lawful Products [§ 1.20]

1. Exceptions
 - a. Discrimination by nonprofit corporation because nonprofit corporation discourages the general public from using a lawful product. [Wis. Stat.](#) § 111.35(1)(a).
 - b. Discrimination by nonprofit corporation based on the nonuse of a lawful product that nonprofit corporation encourages public to use. [Wis. Stat.](#) § 111.35(1)(b).
 - c. Per [Wis. Stat.](#) § 111.35(2), employer may refuse to employ when use or nonuse of lawful product:

- (1) Impairs individual's ability to undertake job-related responsibilities;
 - (2) Creates a conflict of interest or the appearance of a conflict of interest with job-related responsibilities;
 - (3) Conflicts with bona fide occupational qualification;
 - (4) Violates [Wis. Stat.](#) § 254.92(2) (purchase or possession of cigarettes, nicotine products, or tobacco products by minor); or
 - (5) Conflicts with any state or federal statute, rule, or regulation.
2. Employer may offer different life, health, or disability insurance or charge different price for that insurance based on employee's use or nonuse of a lawful product if price differential reflects actual cost of coverage. [Wis. Stat.](#) § 111.35(3).
 3. Individual who smokes tobacco may, under certain circumstances, be refused employment as a firefighter. [Wis. Stat.](#) § 111.35(4).

M. Meetings or Communication About Religious or Political Matters [§ 1.21]

1. Prohibited acts
 - a. Discharging or otherwise discriminating against an employee because the employee declines to attend an employer-sponsored meeting or to participate in any communication with the employer or with an agent, representative, or designee of the employer about religious or political matters. [Wis. Stat.](#) § 111.365(1)(a).
 - b. Threatening to discharge or otherwise discriminate against an employee as a means of requiring the employee to attend a meeting or participate in a communication about religious or political matters. [Wis. Stat.](#) § 111.365(1)(b).
2. Exceptions
 - a. The employer is a not-for-profit religious association or an organization or corporation that is owned or controlled by such a religious association and the primary purpose of the meeting or communication is to convey the employer's religious beliefs, tenets, or practices. [Wis. Stat.](#) § 111.365(2)(a).
 - b. The employer is a political organization, such as a political party or other organization that engages in political activities, and the primary purpose of the meeting or communication is to convey the employer's political tenets or purposes. [Wis. Stat.](#) § 111.365(2)(b).
 - c. The primary purpose of the meeting or communication is to convey information about religious or political matters that the employer is required by law to communicate and no other religious or political information is conveyed beyond what is legally required. [Wis. Stat.](#) § 111.365(2)(c).

- d. The discussion by an employer's executive, managerial, or administrative personnel relates to the operation of the employer's program, business, or enterprise, including issues relating to religious or political matters. [Wis. Stat.](#) § 111.365(2), (3)(b).
- e. Employee attendance at the meeting or communication offered by the employer about religious or political matters is purely voluntary. [Wis. Stat.](#) § 111.365(3)(c).

N. Access to Personal Internet Accounts [§ 1.22]

See [Wis. Stat.](#) §§ 111.322(2m)(a), (b), 111.91(2)(im), 995.55.

1. Prohibited acts

- a. An employer cannot request or require an employee or applicant to disclose access information, grant access, or allow observation of a personal internet account as a condition of employment.
- b. An employer also cannot discharge or otherwise discriminate against a person who refuses such a request or opposes such practices.

2. Exceptions

- a. An employer may discharge or discipline an employee for transferring proprietary or confidential information, or financial data, to the employee's personal internet account without authorization.
- b. An employer may conduct an investigation of certain misconduct if the employer has reasonable cause to believe that activity in the personal internet account relating to the misconduct has occurred. In conducting an investigation, an employer may require an employee to grant access or allow observation of a personal internet account, but cannot require the employee to disclose access information for that account. Misconduct includes:
 - (1) Any alleged unauthorized transfer of proprietary or confidential information, or financial data,
 - (2) Any other alleged employment-related misconduct,
 - (3) Any violation of the law, or
 - (4) Any violation of the employer's work rules as specified in an employee handbook.
- c. An employer may restrict or prohibit a person's access to certain internet sites while using a device or network that is supplied or paid for in whole or in part by the employer.
- d. An employer may request or require access to a device, account, or service that is supplied or paid for in whole or in part by the employer, which is provided by virtue of the employment relationship or is used for the employer's business purposes.
- e. An employer may view, access, or use information about an employee or applicant that is available in the public domain or that can be viewed without access information.

- f. An employer may request or require disclosure of an employee's personal email address.
- g. An employer in the securities industry is not barred from complying with regulations relating to applicant screening and business oversight.
- h. An employer that inadvertently obtains access information, through use of the employer's network or use of a device that is supplied or paid for in whole or in part by the employer, is not liable for possessing that information so long as the information is not used to access the employee's personal internet account.

IV. PREHEARING PROCEDURE [§ 1.23]

A. Preparing and Filing Complaint [§ 1.24]

See [Wis. Admin. Code](#) § DWD 218.03 regarding fair employment complaints.

1. Fill out Discrimination Complaint – Fair Employment form and file in person at any division office or mail or fax to one of the following offices:
 - a. 819 N. 6th Street, Milwaukee, WI 53203, fax number (414) 227-4084; or
 - b. 201 E. Washington Ave., Madison, WI 53703, fax number (608) 327-6001.
2. Must be signed by complainant.
3. Must provide detailed statement of discrimination.
4. Complaint form is available on the DWD's website, Discrimination Complaint (June 2021), <https://dwd.wisconsin.gov/dwd/forms/erd/doc/erd-4206-e.doc>.
5. If age, sex, race, religion, or national-origin discrimination is alleged, may simultaneously file duplicate original complaint with Equal Employment Opportunity Commission (EEOC), 310 W. Wisconsin Ave., Suite 500, Milwaukee, WI 53203–2292. 29 [U.S.C.](#) § 206(d); 29 [U.S.C.](#) §§ 621–634; 42 [U.S.C.](#) §§ 2000e–2000e-17.

B. Time Limits [§ 1.25]

1. File with the ERD within 300 days after occurrence of discrimination. [Wis. Stat.](#) § 111.39(1).
2. Evidence of state of mind or intent during a specific period outside the 300-day limit, if not unduly remote in time, may be relevant to prove state of mind or intent during a period within the 300-day limit. *Abbyland Processing v. LIRC*, 206 Wis. 2d 309 (Ct. App. 1996).
3. If pursuing a federal complaint with the EEOC, consult federal law on time limits for filing. 29 [U.S.C.](#) § 206(d); 29 [U.S.C.](#) §§ 621–634; 42 [U.S.C.](#) §§ 2000e–2000e-17.

C. Review of Sufficiency of Complaint [§ 1.26]

1. ERD preliminary review

- a. Per [Wis. Admin. Code](#) § DWD 218.05(1), the ERD reviews complaint for the following requirements:
 - (1) Whether the complainant is protected by the WFEA,
 - (2) Whether the respondent is subject to the WFEA,
 - (3) Whether the complaint states a claim for relief under the WFEA, and
 - (4) Whether the complaint was filed within the appropriate time period.
- b. If any requirement is not met:
 - (1) The ERD serves all parties with determination and order dismissing complaint. [Wis. Admin. Code](#) § DWD 218.05(2).
 - (2) Order dismissing complaint may be appealed by filing written request with the ERD administrator within 20 days after order; request must specifically state grounds of appeal. [Wis. Admin. Code](#) § DWD 218.05(3).
 - (3) The administrative law judge (ALJ) reviews preliminary determination and affirms, reverses, modifies, or sets aside. [Wis. Admin. Code](#) § DWD 218.05(3).
 - (4) If determination is reversed or set aside, complaint is remanded for investigation, *see infra* § [1.29](#). [Wis. Admin. Code](#) § DWD 218.05(3).
 - (5) If determination is affirmed, decision may be appealed to the LIRC if it is *final* (i.e., disposes of entire controversy and leaves no further procedure on complaint pending before division). [Wis. Admin. Code](#) §§ DWD 218.05(3), DWD 218.21(1).
- c. If all requirements are met, complaint is referred for investigation, *see infra* § [1.29](#).

2. Motion to dismiss

- a. Any party may move to dismiss for lack of subject-matter jurisdiction under [Wis. Admin. Code](#) § DWD 218.10.
- b. If motion is granted:
 - (1) Complaint dismissed; and
 - (2) ERD dismissal order subject to LIRC review, *see infra* § [1.42](#).
- c. If motion is denied, complaint is referred for investigation, *see infra* § [1.29](#).

D. Amending or Withdrawing Complaint [§ 1.27]

1. Per [Wis. Admin. Code](#) § DWD 218.03(6), complaint may be amended subject to the ERD's approval but not less than 45 days before hearing unless good cause is shown.

- a. If amended before initial determination, additional allegations will be investigated.
 - b. If amended after certification for hearing, *see infra* § [1.31](#), may be remanded for investigation and initial determination regarding allegations.
 - c. Amended complaint must meet requirements of [Wis. Admin. Code](#) § DWD 218.05.
2. Per [Wis. Admin. Code](#) § DWD 218.03(7), complaint may be withdrawn by written request at any time.
 - a. Request must be signed by complainant, duly authorized representative, or attorney of record.
 - b. The ERD issues order of dismissal with prejudice unless otherwise stated.

E. Service and Response [§ 1.28]

1. The ERD serves complaint on respondent before investigation. [Wis. Admin. Code](#) § DWD 218.04(1).
2. The ERD simultaneously serves respondent with a request for response to be made within time period specified by the ERD. [Wis. Admin. Code](#) § DWD 218.04(2).
3. If no written response is given, the ERD may make initial determination based only on the ERD's investigation and information provided by complainant. [Wis. Admin. Code](#) § DWD 218.04(2).

F. Investigation [§ 1.29]

See [Wis. Admin. Code](#) § DWD 218.06 regarding investigation of complaints.

G. Determination on Probable Cause [§ 1.30]

1. After investigation, the ERD prepares written initial determination on probable cause. [Wis. Admin. Code](#) § DWD 218.07(1).
2. *Probable cause* means reasonable ground for belief, supported by facts and circumstances strong enough for a prudent person to believe discrimination has occurred. [Wis. Admin. Code](#) § DWD 218.02(8).
3. If initial determination finds no probable cause:
 - a. Complainant may request an ERD hearing on probable cause by filing written request with the ERD within 30 days after date of initial determination. [Wis. Admin. Code](#) § DWD 218.08(1).
 - b. ERD hearing on probable cause conducted pursuant to [Wis. Admin. Code](#) §§ DWD 218.11 and DWD 218.13–.20, except parties may stipulate that the ALJ may decide case on merits, *see infra* § [1.37](#). [Wis. Admin. Code](#) § DWD 218.08(3).

- c. If a probable-cause hearing is requested when there is also a finding of probable cause with respect to one or more separate issues, the probable-cause hearing and a hearing on the merits may be consolidated, if the parties consent. [Wis. Admin. Code](#) § DWD 218.08(3).
 - (1) Finding of no probable cause following hearing is subject to LIRC review, *see infra* § [1.42. Wis. Admin. Code](#) § DWD 218.20(2).
 - (2) If the ALJ finds probable cause, parties may attempt conciliation with or without assistance from DWD or set the matter for hearing on the merits, *see infra* §§ [1.31, .32. Wis. Admin. Code](#) §§ DWD 218.09, DWD 218.11.
4. If initial determination finds probable cause, parties may attempt settlement with or without DWD help. [Wis. Admin. Code](#) § DWD 218.09.

H. Notice of Hearing [§ 1.31]

See [Wis. Stat.](#) § 227.44(1)–(2) and [Wis. Admin. Code](#) § DWD 218.11 for notice requirements.

1. Notice of hearing is issued following initial determination of probable cause or appeal of initial no-probable-cause determination.
2. Notice to consist of:
 - a. Identification of parties and case number;
 - b. Statement of time, place, and nature of hearing; and
 - c. Statement of legal authority and jurisdiction.
3. The ERD requires
 - a. Hearing scheduled not less than 30 days after notice served.
 - b. Hearing to be held in
 - (1) County of respondent's residence,
 - (2) County where discrimination occurred, or
 - (3) Another location, upon consent of parties.
 - c. The ERD serves copy of complaint with notice of hearing.

I. Answer [§ 1.32]

1. Answer is respondent's statement admitting or denying allegations of complaint and asserting affirmative defenses. [Wis. Admin. Code](#) § DWD 218.12(2).

2. Answer must contain respondent's current address. [Wis. Admin. Code](#) § DWD 218.12(2).
3. Affirmative defense of statute of limitation must be raised, if not done so by prior motion, or may be waived, absent good cause. [Wis. Admin. Code](#) § DWD 218.12(2).
4. The ERD requires answer within 21 days after date of notice of hearing. [Wis. Admin. Code](#) § DWD 218.12(1).

J. Discovery [§ 1.33]

1. Once matter is certified to hearing, discovery is to be as provided in [Wis. Stat.](#) ch. 804. [Wis. Admin. Code](#) § DWD 218.14(3).
2. Party seeking discovery from unrepresented party must, at least 10 days before conducting discovery, state intention to do so in writing to chief of hearing section or the ALJ, if assigned. [Wis. Admin. Code](#) § DWD 218.14(2).
3. All copies of discovery demands, deposition notices, responses, and original transcripts from depositions must be filed with the DWD when served on unrepresented party. [Wis. Admin. Code](#) § DWD 218.14(2).

K. Miscellaneous Prehearing Provisions [§ 1.34]

1. Witness and exhibit lists. [Wis. Admin. Code](#) § DWD 218.17.
 - a. File and exchange names of witnesses and copies of exhibits 10 days before hearing.
 - b. Failure to exchange may trigger exclusion of witnesses or exhibits.
2. Subpoenas. [Wis. Stat.](#) § 227.46(1)(b).
 - a. A party's attorney of record may issue a subpoena to compel witness's attendance or production of evidence. [Wis. Stat.](#) § 227.45(6m).
 - b. Serve and enforce subpoenas as in other civil litigation.
 - c. Send copy of subpoena to administrative decision maker.
3. Motions. [Wis. Admin. Code](#) § DWD 218.15(2).
 - a. File motions with ALJ.
 - b. Motions decided without argument unless the ALJ requests.
4. Postponement. [Wis. Admin. Code](#) § DWD 218.18(2).
 - a. Request within 10 days after notice of hearing (unless emergency), with copy sent to the ERD and all parties.
 - b. Requires good cause.

V. HEARING [§ 1.35]**A. Procedure [§ 1.36]**

1. Hearing recorded. [Wis. Admin. Code](#) § DWD 218.19.
 - a. Requesting party must pay expense for record transcript.
 - b. Exceptions
 - (1) The ERD will transcribe without charge if complaint is to be judicially reviewed.
 - (2) Free copy of transcript for other purposes is available if standard of indigency met; file affidavit of indigency.
2. Evidence. [Wis. Stat.](#) § 227.45.
 - a. [Wis. Stat.](#) ch. 227 applies. [Wis. Admin. Code](#) § DWD 218.18(1).
 - b. The ERD is not bound by common-law or statutory rules of evidence except for rules of privilege and materiality. [Wis. Stat.](#) § 227.45.
3. Procedure at hearing
 - a. Hearing examiner (ALJ) presides. [Wis. Stat.](#) §§ 111.39(4)(a), 227.46(1).
 - b. Witnesses sworn and testify under oath. [Wis. Stat.](#) § 227.46(1)(a).
 - c. All witnesses subject to cross-examination. [Wis. Stat.](#) § 227.45(6).
 - d. Rebuttal evidence allowed. [Wis. Stat.](#) § 227.44(3).
 - e. Documents, including those from the ERD file, marked and moved into record. [Wis. Stat.](#) § 227.45(2).
 - f. Objections. [Wis. Stat.](#) §§ 227.45(1), 227.46(1).
 - (1) May be made to questions, testimony, and offered exhibits
 - (2) Objections to be noted in record
 - (3) Argument on objections allowed at the ALJ's discretion
 - g. Motions. [Wis. Admin. Code](#) § DWD 218.15(2).
 - (1) Allowed at hearing
 - (2) Argument on motions allowed at the ALJ's discretion

B. Decision, Order, and Remedy [§ 1.37]

1. Per [Wis. Stat.](#) § 227.46(1)(h) and [Wis. Admin. Code](#) § DWD 218.20, the ALJ issues decision that includes:
 - a. Findings of fact,
 - b. Conclusions of law,
 - c. Order, and
 - d. Opinion (optional).
2. Order. [Wis. Stat.](#) § 111.39(4)(c); [Wis. Admin. Code](#) § DWD 218.20(2), (3).
 - a. Either dismisses action or awards relief to effectuate the WFEA's purposes.
 - b. Parties may petition for rehearing, LIRC review, or both, *see infra* §§ [1.39](#), [1.43](#). [Wis. Stat.](#) § 227.47(1); [Wis. Admin. Code](#) § DWD 218.21.
 - (1) Petition to be filed within 21 days after date of the ALJ's decision.
 - (2) May be filed at 201 E. Washington Ave., Madison, WI 53703 or 819 N. 6th Street, Milwaukee, WI 53203.
3. Remedies
 - a. Instatement or reinstatement
 - b. For retaliation claims under [Wis. Stat.](#) § 111.322(2m), compensation may be awarded instead of reinstatement (may not be less than 500 times nor more than 1,000 times hourly wage when retaliation occurred). [Wis. Stat.](#) § 111.39(4)(c).
 - c. Back pay. [Wis. Stat.](#) § 111.39(4)(c).
 - (1) Liability may not accrue from a date that is more than two years before complaint.
 - (2) Accrual of back pay is terminated by a valid offer of reinstatement. *Anderson v. LIRC*, 111 Wis. 2d 245, 255–57 (1983).
 - (3) Complainant has a duty to mitigate damages. *State ex rel. Schilling v. Baird*, 65 Wis. 2d 394 (1974).
 - (4) Back pay may be ordered for employee who quits because of discrimination only if constructive discharge is proven. *Marten Transp. Ltd. v. DILHR*, 176 Wis. 2d 1012 (1993).
 - (5) Unemployment or welfare benefits do not reduce back pay, but then are withheld to reimburse agency paying benefits.

- d. Interest added to award at annual rate of 12% simple interest, compounded by calendar quarter. *Anderson*, 111 Wis. 2d at 260; [Wis. Admin. Code](#) § DWD 218.20(4).
- e. Attorney fees and costs. [Wis. Stat.](#) § 227.485; *Watkins v. LIRC*, 117 Wis. 2d 753 (1984).
 - (1) Reasonable attorney fees and costs awarded at the ALJ's discretion.
 - (2) Whether to award and amount of award is decided after finding of discrimination.
- f. Reasonable attorney fees and costs will be awarded if claim or defense is found to be frivolous. [Wis. Stat.](#) § 227.483.
- g. Other affirmative relief to effectuate a WFEA public policy. *Watkins*, 117 Wis. 2d at 763; *Marquardt v. Milwaukee Cnty.*, 2002 WI App 12, 249 Wis. 2d 780.
- h. If motivation for termination is solely discriminatory, full range of remedies should be awarded; if discharge is motivated in part by discriminatory purpose but would not have occurred absent that purpose, the LIRC may award some or all of available remedies; if discharge is motivated in part by discriminatory purpose but would have occurred absent that purpose, only a cease-and-desist order and attorney fees should be awarded. *Hoell v. LIRC*, 186 Wis. 2d 603 (Ct. App. 1994).
- i. No remedy for emotional distress. *Bachand v. Connecticut Gen. Life Ins. Co.*, 101 Wis. 2d 617, 632 (Ct. App. 1981).
- j. Mitigation. *U.S. Paper Converters, Inc. v. LIRC*, 208 Wis. 2d 523 (Ct. App. 1997).
 - (1) Respondent has burden of proving failure to mitigate.
 - (2) Complainant's reasonable failure to comply with new employer's policies, resulting in complainant's termination, does not necessarily constitute failure to mitigate.
- k. Compensatory and punitive damages are no longer available for acts of employment discrimination, unfair honesty, or genetic testing. [Wis. Stat.](#) § 111.39(4)(d).

VI. REHEARING [§ 1.38]

A. Procedure [§ 1.39]

- 1. Petition
 - a. Written petition. [Wis. Stat.](#) § 227.49(1).
 - b. Specify detailed grounds for relief and supporting authority. [Wis. Stat.](#) § 227.49(1).
 - c. File petition within 20 days after service of order and serve on all parties. [Wis. Stat.](#) § 227.49(1).
 - d. Petition is not prerequisite for appeal or review. [Wis. Stat.](#) § 227.49(1).

- e. Petition does not suspend or delay the effective date of order. [Wis. Stat.](#) § 227.49(2).
2. Grounds
 - a. Material error of law. [Wis. Stat.](#) § 227.49(3)(a).
 - b. Material error of fact. [Wis. Stat.](#) § 227.49(3)(b).
 - c. Newly discovered evidence that could not have been discovered previously with diligence. [Wis. Stat.](#) § 227.49(3)(c).
 3. Action on petition
 - a. Agency must order rehearing or enter order on petition within 30 days. [Wis. Stat.](#) § 227.49(5).
 - b. If petition is not disposed of in 30 days, petition is deemed denied. [Wis. Stat.](#) § 227.49(5).
 - c. If petition is granted, agency must schedule rehearing as soon as practicable. [Wis. Stat.](#) § 227.49(6).
 4. Rehearing procedure is the same as for initial hearing unless otherwise ordered, *see supra* § [1.36](#). [Wis. Stat.](#) § 227.49(6).

B. Decision [§ 1.40]

See [Wis. Stat.](#) § 227.49(6).

1. Agency may change original order if that order was unlawful or unreasonable.
2. Decision and order following rehearing have the same effect as original decision and order.

VII. LIRC REVIEW OF ERD DECISIONS [§ 1.41]

A. Matters Reviewable [§ 1.42]

Decisions and orders of the ERD, except affirmations of preliminary determinations that are judicially reviewed, *see supra* §§ [1.26](#), [.38](#).

B. Procedure [§ 1.43]

1. Petition. [Wis. Admin. Code](#) § DWD 218.21.
 - a. File written petition for review in person, by mail, or by fax at ERD Milwaukee or Madison office. [Wis. Stat.](#) § 111.39(5)(a); [Wis. Admin. Code](#) § LIRC 4.01.
 - (1) The ERD, 819 North Sixth Street, Milwaukee, Wisconsin 53203 (FAX: 414-227-4981)

- (2) The central administrative office of the ERD, 201 East Washington Avenue, P.O. Box 8928, Madison, Wisconsin 53708 (FAX: 608-267-4592)
- b. Petition must be *received* by the ERD within 21 days after mailing of order. [Wis. Stat.](#) § 111.39(5)(b).
2. Review is based on “review of the evidence submitted.” [Wis. Stat.](#) § 111.39(5)(b).
3. Oral argument may be granted at the LIRC’s discretion. [Wis. Admin. Code](#) § LIRC 1.06.
4. Briefs. [Wis. Admin. Code](#) § LIRC 1.07.
 - a. Must be requested in petition for review, answer, or in writing thereafter.
 - b. Briefing schedule is set on request.
 - c. Copies of briefs filed must be served on opposing party.
 - d. Written request for extension is granted for good cause.

C. LIRC Decision [§ 1.44]

1. May affirm, reverse, modify, or set aside and remand to the ERD for further proceedings. [Wis. Stat.](#) § 111.39(5)(b).
2. The LIRC may set aside, modify, or change its decision on motion of party made within 28 days after the LIRC decision *and* based on mistake or newly discovered evidence. [Wis. Stat.](#) § 111.39(5)(c).
3. The LIRC may on own motion set aside its decision on grounds of mistake or newly discovered evidence and remand for further proceedings. [Wis. Stat.](#) § 111.39(5)(c).

D. Claim Preclusion/Res Judicata [§ 1.45]

When a discrimination claim brought before the agency could have been brought directly before state or federal court first under 42 [U.S.C.](#) § 1983, complainant will be bound by agency’s unreviewed fact-finding in any subsequent section 1983 court action. *Lindas v. Cady*, 183 Wis. 2d 547 (1994).

VIII. JUDICIAL REVIEW [§ 1.46]

A. Matters Reviewable [§ 1.47]

1. Findings and orders of the LIRC. [Wis. Stat.](#) § 111.395.
2. Other decisions and orders adversely affecting substantial interests, not including the ERD decisions that must be reviewed by the LIRC before judicial review. [Wis. Stat.](#) §§ 111.395, 227.52.

B. Procedure [§ 1.48]

1. Per [Wis. Stat.](#) § 227.53(1)(a)1., petitioner may commence review by
 - a. Serving petition personally or by certified mail on affected agency, and
 - b. Filing petition with clerk of circuit court in county where review is to be held.
2. If seeking review of decision of tax appeals commission, banking institutions review board, or credit union review board, serve petition on both agency and corresponding named respondent. [Wis. Stat.](#) § 227.53(1)(a)1.
3. Review to be commenced by petitioner within 30 days after service of agency decision. [Wis. Stat.](#) § 227.53(1)(a)2.
4. Venue. [Wis. Stat.](#) § 227.53(1)(a)3.
 - a. In county where petitioner resides
 - b. Exceptions
 - (1) If petitioner is an agency, then where respondent resides.
 - (2) If petitioner is not a state resident, then in county where property affected by decision is located or, if no property is affected, in county where dispute arose.
 - (3) If multiple petitions are filed:
 - (a) First petition determines venue, *but*
 - (b) Court may grant transfer or consolidation if appropriate.
 - (4) Transfer
 - (a) If parties stipulate, *and*
 - (b) Court to which transfer sought agrees.
5. Per [Wis. Stat.](#) § 227.53(1)(b), petition to include:
 - a. Nature of petitioner's interest,
 - b. Facts showing petitioner aggrieved by decision, and
 - c. Applicable grounds specified in [Wis. Stat.](#) § 227.57.
6. Caption. [Wis. Stat.](#) § 227.53(1)(b).

- a. Petitioner: Person seeking review
- b. Respondent: Agency whose decision is to be reviewed
7. Amendment with court's permission. [Wis. Stat.](#) § 227.53(1)(b).
8. Service. [Wis. Stat.](#) § 227.53(1)(c).
 - a. Serve each party or attorney of record personally or by certified mail or, when service is timely admitted in writing, by first-class mail.
 - b. Serve not later than 30 days after commencement of action for review.
9. Notice of appearance and statement of position. [Wis. Stat.](#) § 227.53(2).
 - a. Serve on petitioner, respondent, and attorney general within 20 days after service of petition.
 - b. File with clerk of court together with proof of service within 10 days after service on petitioner, respondent, and attorney general.
10. State Department of Justice represents the LIRC. [Wis. Stat.](#) § 111.395.
11. Enforcement of agency decision is not stayed automatically, but reviewing court may order a stay upon such terms as it deems proper. [Wis. Stat.](#) § 227.54.
12. Record. [Wis. Stat.](#) § 227.55.
 - a. Agency to transmit record within 30 days after service of petition for review.
 - b. Record may be shortened by stipulation of all parties.
 - c. Any party other than agency refusing to stipulate may be taxed by court for additional cost.
13. Method of review
 - a. Additional evidence. [Wis. Stat.](#) § 227.56(1).
 - (1) Before trial date, apply to court for permission to present additional evidence.
 - (2) Must show
 - (a) Additional evidence is material, *and*
 - (b) Good reasons exist for failure to present in prior proceedings.
 - (3) Additional evidence taken before the ERD or the WERC
 - (a) Agency may modify findings and decision based on additional evidence.

- (b) Agency files any modified decision or order and additional evidence with court.
- b. Motion to dismiss. [Wis. Stat.](#) § 227.56(3).
 - (1) May be filed within 20 days after time specified in [Wis. Stat.](#) § 227.53 for filing notice of appearance.
 - (2) After hearing on motion, permission to amend petition may be granted.
- c. Proceedings may be brought for hearing or trial on not less than 10 days' notice after expiration of time for service of notice of appearance. [Wis. Stat.](#) § 227.56(2).

C. Scope of Review and Decision [§ 1.49]

1. Review confined to record except testimony is allowed when irregularities in procedure are alleged. [Wis. Stat.](#) § 227.57(1).
2. Court must affirm decision unless error is established. [Wis. Stat.](#) § 227.57(2).
3. Court must treat disputed issues of procedure, law, fact, or policy separately. [Wis. Stat.](#) § 227.57(3).
4. Court must remand if it finds that a material error in procedure or a failure to follow procedure affected fairness or correctness of agency action or proceedings. [Wis. Stat.](#) § 227.57(4).
5. Per [Wis. Stat.](#) § 227.57(5), court must set aside or modify agency action, or remand for proceedings under correct interpretation of law if
 - a. Erroneous interpretation of law, *and*
 - b. Correct interpretation compels different decision. *See American Motors Corp. v. LIRC*, 119 Wis. 2d 706, 710 (1984).
6. Court must not substitute judgment on weight of evidence in contested-case proceeding; may set aside action or remand if action dependent on finding of fact not supported by substantial evidence in record. [Wis. Stat.](#) § 227.57(6); *Holtz & Krause, Inc. v. DNR*, 85 Wis. 2d 198, 204 (1978).
7. If action is based on facts determined without hearing, court may set aside, modify, remand to agency, or order agency action if facts compel particular action as matter of law. [Wis. Stat.](#) § 227.57(7).
8. Court must reverse or remand if agency improperly exercised discretion, but court not to substitute judgment on issue of discretion. [Wis. Stat.](#) § 227.57(8).
9. While due weight must be accorded to the experience, technical competence, specialized knowledge, and discretionary authority of agency, courts do not defer to agency's interpretation of law. [Wis. Stat.](#) § 227.57(10), (11); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496.

10. Decision on review must provide appropriate relief and necessary interlocutory orders to preserve interests of parties or public. [Wis. Stat.](#) § 227.57(9).

D. Appeal [§ 1.50]

1. Any party may appeal final judgment of circuit court within time specified in [Wis. Stat.](#) § 808.04(1). [Wis. Stat.](#) § 227.58.
2. Appellate procedure set forth in [Wis. Stat.](#) ch. 808. [Wis. Stat.](#) § 227.58.
3. The court of appeals reviews LIRC's decision and not that of the circuit court. *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶ 26, 303 Wis. 2d 514. LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis. 2d 927, 931 (Ct. App.1995). The court of appeals searches the record for credible evidence supporting LIRC's factual determinations rather than weighing evidence against them. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097 (1975).

Chapter 2

Unemployment Insurance

Victor Forberger

Madison

NOTE: The author thanks Tracey Schwalbe for creating such a remarkably thorough overview of Wisconsin unemployment law.

ALERT: Throughout 2021, the federal and state governments continued to make changes to the unemployment insurance program to deal with the COVID-19 pandemic. Sections [2.34–.36](#), *infra*, discuss those governmental responses. The public information regarding Wisconsin's pandemic response has been removed from the website of the Department of Workforce Development (DWD) and has been replaced with a single web page offering basic information at <https://dwd.wisconsin.gov/uiben/programs/> (last visited May 18, 2022). Federal guidance still can be found on the website of the U.S. Dep't of Lab., *Unemployment Insurance Relief During COVID-19 Outbreak*, <https://www.dol.gov/coronavirus/unemployment-insurance> (last visited May 17, 2022). Because of ongoing delays in processing and litigating pandemic-related unemployment claims, some otherwise expired or suspended emergency rules may still be relevant, and citations, where appropriate, will be provided. For emergency rules currently in effect, see Wis. State Leg., *Active Emergency Rules*, https://docs.legis.wisconsin.gov/code/emergency_rules/active (last visited May 17, 2022). A list of all federal program letters is posted on the U.S. Department of Labor's Employment and Training Administration (ETA) web page, https://wdr.doleta.gov/directives/all_advisories.cfm (last updated Nov. 4, 2021). For the ETA's advisory checklists update as of January 14, 2021, see the ETA's Training and Employment Notice No. 15-20, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4840.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 209; all references to the Wisconsin

Administrative Code are current through Wis. Admin. Reg., Mar. 2022, No. 795; all references to the U.S. Code (U.S.C.) and the Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-102 (Mar. 15, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 16,651 (Mar. 24, 2022).

I. INTRODUCTION [§ 2.51]

This chapter describes the procedures for resolving disputes relating to employee-benefit claims and employer liability under [Wis. Stat.](#) ch. 108. The procedures are relevant for representing both employee clients and employer clients. Recent Labor & Industry Review Commission (LIRC) cases and digests are accessible online at <https://lirc.wisconsin.gov/> (last visited May 17, 2022). Unemployment insurance (U.I.) publications, including handbooks for employers and employees, are available on the website of the DWD, at <https://dwd.wisconsin.gov/ui201/> (for employers, last updated Sept. 30, 2020) and <https://dwd.wisconsin.gov/uiben/handbook/> (for claimants, last updated Jan. 12, 2022).

II. COVERED EMPLOYER [§ 2.52]

A. Determination of Coverage [§ 2.53]

1. Private employers are covered if they employ one or more employees in employment covered by the law in at least 20 weeks of the current or preceding calendar year or pay wages equal to \$1,500 or more in a calendar quarter in the current or preceding calendar year, subject to exclusions from employment in [Wis. Stat.](#) § 108.02(15). [Wis. Stat.](#) § 108.02(13)(e).
 - a. Private employers of an individual in domestic service are covered if wages of \$1,000 or more are paid in any quarter in the current or preceding year. [Wis. Stat.](#) § 108.02(13)(d).
 - b. Agricultural employers are covered if wages paid totaled \$20,000 or more during any quarter or if the employer employed 10 or more individuals on at least 20 days in different calendar weeks in the current or preceding year. [Wis. Stat.](#) § 108.02(13)(c).
 - c. Professional employer organizations (PEOs) are recognized as employers under specified conditions. [Wis. Stat.](#) §§ 108.02(21e), 108.065.
2. Nonprofit employers are covered if at least four individuals are employed for some part of a day on 20 days in different calendar weeks in the current or preceding year. [Wis. Stat.](#) § 108.02(13)(b).
3. Governments and Indian tribes are covered employers. [Wis. Stat.](#) § 108.02(13)(a).
4. Contributions
 - a. Private employers pay contributions based on payroll to fund U.I. benefits paid to their employees, the rate for which is based on the employer's experience with unemployment. [Wis. Stat.](#) § 108.18; *see* [Wis. Stat.](#) § 108.02(21).

NOTE: During the COVID-19 pandemic, the DWD's process for waiving benefit charges arising from pandemic-related job losses was confusing. Initially, employers had to submit additional paperwork to indicate that previous layoffs were pandemic related. *See*

generally 2019 Wis. Act 185; DWD Emergency Rule 2044 (expired May 5, 2021). The legislature created a presumption of pandemic relatedness only for layoffs connected to initial claims beginning on or after March 15, 2020, through March 13, 2021. 2021 Wis. Act 4. For any other job losses that were pandemic related (such as employees quitting because of COVID-19 quarantines or loss of child care), employers needed to submit additional paperwork to the DWD either before May 1, 2021, for previous job losses, or within 30 days after any newly litigated job losses connected to this time period. For pandemic-related job losses, employers are relieved from benefit charges. *See* U.S. Dep't of Lab., Unemployment Insurance Program Letter (UIPL) No. 13-20 (Mar. 22, 2020), at 3-4.

- b. Governments, Indian tribes, and nonprofits generally do not pay contributions on payroll but reimburse the U.I. trust fund for benefits paid. [Wis. Stat.](#) §§ 108.15, 108.151, 108.152.

B. Definition of Employee [§ 2.54]

1. *Employees* include persons who perform services for pay, unless they are independent contractors, *see infra* § 2.13, para. 13.h. [Wis. Stat.](#) § 108.02(12).
2. Sole proprietors and partners in businesses that operate as partnerships are not employees with respect to their services performed for the sole proprietorship or partnership. Limited liability companies (LLCs) are treated as sole proprietors or partnerships unless treated as corporations by the IRS. [Wis. Stat.](#) §§ 108.02(12)(dm), (dn), 108.068.

C. Notice Requirement [§ 2.55]

1. Employers must post notices about availability of U.I. [Wis. Stat.](#) § 108.04(2)(c); [Wis. Admin. Code](#) § DWD 120.01. This may be posted on an employer's work website that is accessible to all employees or distributed by email. [Wis. Admin. Code](#) § DWD 120.01 note.
2. A copy of the notice to employees about applying for unemployment benefits is available online at <https://dwd.wisconsin.gov/dwd/publications/ui/notice.htm> (last visited May 17, 2022). [Wis. Admin. Code](#) § DWD 120.01 note.

III. INITIAL CLAIM [§ 2.56]

A. In General [§ 2.57]

See [Wis. Stat.](#) § 108.06.

1. Claiming process starts when employee files the initial claim (a claimant not presently eligible may start the benefit year in anticipation of impending layoff to preserve high-quarter wages). [Wis. Stat.](#) § 108.06; [Wis. Admin. Code](#) ch. DWD 129.
2. In the initial claim, claimant must identify the reason he or she is no longer working.

B. Qualifying [§ 2.58]

1. Per [Wis. Stat.](#) § 108.04(4), to start a new claim, claimant must

- a. Have base-period wages (i.e., monetary eligibility) equal to 35 times the claimant's benefit rate, with 4 times the benefit rate occurring outside the high quarter of base period. [Wis. Stat.](#) § 108.04(4)(a).
 - (1) Base period is the first four of five most recently completed quarters preceding claimant's benefit year. If claimant is unable to qualify using the regular base period, an alternative base period of four most recently completed quarters may be applied. [Wis. Stat.](#) § 108.02(4).
 - (2) The DWD will publish on its website a weekly benefit rate schedule of quarterly wages and the corresponding weekly benefit rates. [Wis. Stat.](#) § 108.05(1)(r); *see* DWD, *Benefit Rate Chart*, <https://dwd.wisconsin.gov/uiben/handbook/pdf/wbrchart.pdf> (last visited May 17, 2022).
- b. Have four percent of his or her high-quarter wages equal to at least the minimum weekly benefit rate. [Wis. Stat.](#) § 108.05(1).
- c. Be able to work and available for work. [Wis. Admin. Code](#) § DWD 128.01.
- d. Be registered for work, conducting a reasonable search for suitable work, providing work search information to the DWD, and participating in a public employment office workshop or training program or similar reemployment services required by DWD. [Wis. Stat.](#) § 108.04(2); [Wis. Admin. Code](#) chs. DWD 126, DWD 127; [Wis. Admin. Code](#) § DWD 128.03.

NOTE: The DWD must conduct random audits of claimants' weekly work-search efforts. [Wis. Stat.](#) § 108.14(20).

- e. There is a one-week waiting period for benefits. This means a claimant is not eligible to receive benefits the first week the claimant qualifies for benefits. [Wis. Stat.](#) §§ 108.02(26m), 108.04(3).

NOTE: In 2019 Wis. Act 185, the legislature suspended the waiting week with respect to benefit years that began after March 21, 2020, and before February 7, 2021. The suspension was extended to benefit years that begin before March 14, 2021, by 2021 Wis. Act 4. That waiver was not renewed by further legislation or emergency rule.

- 2. Claimants included in a work-share program may generally receive partial benefits under an employer's approved work-share plan and need not meet requirements related to being able and available to work, having registered for work, and conducting a reasonable search for suitable work. [Wis. Stat.](#) §§ 108.062, 108.04(2)(a), 108.05(1). The program was extended in 2021 Wis. Act 4 to apply to plans submitted before the conclusion of a national emergency in response to COVID-19 or before July 4, 2021, whichever was earlier. [Wis. Stat.](#) § 108.062(20). Recent legislation has made some of these changes permanent. *See* 2021 Wis. Act 231 (repealing [Wis. Stat.](#) § 108.062(20)).
- 3. There is a rebuttable presumption that a claimant required to conduct a work search has not conducted a reasonable search for suitable work in a week if the claimant was last employed by a temporary help employer, the claimant was required to contact the temporary help employer for work but has failed to do so, and certain other requirements have been met. [Wis. Stat.](#)

§ 108.04(2)(i); see Victor Forberger, *Job Searching and Temp Agencies: Weekly Contacts Now Mandated*, Wisconsin Unemployment (May 19, 2015), <https://wisconsinui.wordpress.com/2015/05/19/job-searching-and-temp-agencies-weekly-contacts-now-mandated/> (discussing *Brown v. Seek Career/Staffing Inc.*, UI Dec. Hearing No. 14402929AP (LIRC Dec. 18, 2014)).

4. Claimants must create security credentials to file a claim and will be held responsible for giving out security credentials that enable another person to improperly file for benefits on the claimant's behalf. [Wis. Stat.](#) § 108.04(2)(g).

C. Monetary Determination [§ 2.59]

1. The DWD computes entitlements.
 - a. Calculated as follows:
 - (1) Maximum benefit amount equals lesser of 26 times the weekly benefit rate or 40% of base-period wages. [Wis. Stat.](#) § 108.06(1).
 - (2) Duration may be lengthened during periods triggered “on” for federal or state extended benefits, see part IX, sections [2.33–.35](#), *infra.* [Wis. Stat.](#) §§ 108.141, 108.142.
 - (3) Benefit rate equals 4% of high-quarter wages. [Wis. Stat.](#) § 108.05(1).
 - b. Computation mailed or electronically delivered to claimant and employers. [Wis. Stat.](#) § 108.09(2)(a).
 - c. Either claimant or employer may normally ask for recomputation to correct errors. [Wis. Stat.](#) § 108.09(2)(a).
 - d. If computation remains disputed, DWD issues an appealable determination. [Wis. Stat.](#) § 108.09(2)(b).
2. DWD sends report forms to employers listed on initial claim form.
 - a. Permits employer to confirm, identify, or correct the following: employer's U.I. account number; employee's last day of work; reason for employee's separation from work; and payments made after last day of work for holiday, vacation, dismissal, or sick leave.
 - b. Per [Wis. Stat.](#) § 108.09(1), an employer must return the form promptly to notify DWD if the information on the form is incorrect, the reason for separation is missing, or payments were made since the last day of work for holiday, vacation, dismissal, or sick leave. If the form must be returned and it is not returned, the following might occur:
 - (1) Claim may be processed based on available information.
 - (2) Employer who fails to provide correct and complete information may be penalized. [Wis. Stat.](#) § 108.04(13)(c), (e), (f).

IV. ELIGIBILITY ISSUES [§ 2.60]**A. In General [§ 2.61]**

1. Various provisions of [Wis. Stat.](#) ch. 108 may affect claimant's right to benefits.
 - a. Employers may question eligibility on DWD report form.
 - b. Per [Wis. Stat.](#) § 108.04(13)(a), DWD must take administrative notice of ineligibility as indicated in
 - (1) Initial claim, or
 - (2) Weekly claim certifications.
2. Section [2.12](#), *infra*, discusses most types of disputed claims.

B. Separation Issues [§ 2.62]

1. Discharge for job-related misconduct. [Wis. Stat.](#) § 108.04(5).
 - a. Reduces wages from discharging employer by 100%. [Wis. Stat.](#) § 108.04(5); *Boynton Cab Co. v. Neubeck*, 237 Wis. 249 (1941).
 - b. Suspends benefits based on wages from other employers until seven weeks have elapsed since the week of discharge *and* wages equal to 14 times the weekly benefit rate have been earned.
 - c. Per [Wis. Stat.](#) § 108.04(5)(a)–(g), misconduct includes
 - (1) A violation by an employee of an employer's reasonable written policy concerning the use of alcohol beverages, or use of a controlled substance, if the employee (a) had knowledge of the policy and (b) admitted to use or refused to take a test or tested positive for the use of alcohol or a controlled substance using a testing methodology approved by DWD.

NOTE: Hair testing is insufficiently reliable to form the sole basis for the finding of misconduct; the DWD and LIRC accept only urine testing. *Brandt v. Scot Forge Co.*, UI Dec. Hearing No. 09006150MD (LIRC July 18, 2013).

- (2) Theft of an employer's property or services with intent to deprive the employer of the property or services permanently, theft of currency of any value, felonious conduct connected with the employment, or intentional or negligent conduct that causes substantial damage to the employer's property.

CAUTION: Pursuant to the last portion of this disqualification, there is no requirement that the substantial damage be the result of intentional action by the employee. In other words, negligent conduct that leads to substantial damage to the employer's property by the employee now qualifies as misconduct. *Hamson v. Ozark Motor Lines*, UI Dec. Hearing No. 14004168MD (LIRC Mar. 5, 2015) (holding that

employee's loss of control of employer's truck because of negligence, causing more than \$50,000 in damage to truck, was misconduct; also noting that analysis of accidents in trucking industry has been modified by enactment of [Wis. Stat. § 108.04\(5\)\(b\)](#)); *Kriedeman v. Waupaca Foundry Inc.*, UI Dec. Hearing No. 16400165AP (LIRC June 2, 2016) (concluding that employee's intentional destruction of \$1,200 helmet was "considerable in amount, value or worth"; the legislature did not specify where the line between non-substantial and substantial damage lies; and the damage was "substantial" in the totality of the circumstances in this case); *Deglow v. Muscoda Protein Prods.*, UI Dec. Hearing No. 15001774MD (LIRC Sept. 25, 2015) (finding \$330 in negligent damage not substantial).

NOTE: The damage at issue must be to an employer's property or services. *Tairi v. Wal-Mart Assocs. Inc.*, UI Dec. Hearing No. 16602628MW (LIRC Aug. 30, 2016) (concluding that employee who fell victim to telephone-transaction scam that cost employer nearly \$900 did not "damage" the employer's property).

- (3) Conviction of an employee of a crime or other offense subject to civil forfeiture, while on or off duty, if the conviction makes it impossible for the employee to perform the employee's duties for the employer.
- (4) One or more threats or acts of harassment, assault, or other physical violence instigated by an employee at the workplace.
- (5) Absenteeism on more than two occasions within the 120-day period before the date of the employee's termination, unless otherwise specified in an employment manual that the employee had received, or excessive tardiness by an employee in violation of a policy that has been communicated to the employee, if the employee does not provide both notice and one or more valid reasons for the absenteeism or tardiness.

In *DWD v. LIRC (Beres)*, 2018 WI 77, ¶¶ 19, 23, 382 Wis. 2d 611, the Wisconsin Supreme Court held that an employer can have an absenteeism and tardiness policy that is even more restrictive than [Wis. Stat. § 108.04\(5\)\(e\)](#) in disqualifying an employee for purposes of misconduct. In *Stangel v. Spancrete Inc.*, UI Dec. Hearing No. 17402720MW (LIRC July 30, 2018), LIRC applied the matter-of-fact holding of *Beres* to find that an employee whose absences led to too many points in violation of the employer's attendance policy was disqualified for misconduct, regardless of the reasons for those absences. LIRC stated in *Stangel* that, so "long as the termination comports with the terms of that [employer] policy[,] the employee's violation of the policy will constitute misconduct pursuant to [Wis. Stat. § 108.04\(5\)\(e\)](#)." In *Miller v. FEDEX Ground Package System, Inc.*, UI Dec. Hearing No. 18005890MD (LIRC Mar. 29, 2019), however, LIRC reversed course and held that the reasons for an employee's absences or tardiness still mattered in assessing whether they constituted misconduct, regardless of whether those reasons mattered in the employer's absenteeism or tardiness policy. For more information about this absenteeism issue and some important underlying issues, see Victor Forberger, *Beres, Absenteeism, and a Temporary Change of Heart*, Wisconsin Unemployment (Aug. 5, 2019), <https://wisconsinui.wordpress.com/2019/08/05/beres-absenteeism-and-a-temporary-change-of-heart/>.

- (6) Falsifying business records of the employer, unless directed to do so by the employer.

- (7) Unless directed by the employer, a willful and deliberate violation of a written and uniformly applied standard or regulation of the federal government or a state or tribal government by an employee of a licensed or certified employer, which standard has been communicated by the employer to the employee and which violation would cause the employer to be sanctioned or to have its license or certification suspended.

NOTE: Meeting statutory requalifying requirements does not automatically trigger benefits; eligibility depends on losing subsequent employment under nondisqualifying circumstances and having monetary entitlement from other than the employer that discharged the employee on the basis of misconduct.

- d. LIRC follows a three-step approach to analyze discharges for misconduct and substantial fault. *Operton v. LIRC*, 2017 WI 46, 375 Wis. 2d 1; *Dutcher v. American Houses/GR Lake Co.*, UI Dec. Hearing No. 14401425AP (LIRC July 31, 2014).
 - (1) LIRC determines whether the employee's conduct meets any of the actions enumerated in [Wis. Stat.](#) § 108.04(5)(a)–(g), *see supra* paras. 1.c.(1)–(7).
 - (2) If those provisions do not apply, LIRC determines whether the conduct meets the definition of *misconduct* set forth in *Boynton Cab Co. v. Neubeck*, 237 Wis. 2d 49 (1941) and now codified in [Wis. Stat.](#) § 108.04(5)(intro.).
 - (3) If LIRC determines the conduct is not misconduct, then LIRC determines whether the discharge was for *substantial fault*, as defined in [Wis. Stat.](#) § 108.04(5g), connected with the employee's work, *see infra* para. 2.c.
2. Discharge for substantial fault. [Wis. Stat.](#) § 108.04(5g); *Operton v. LIRC*, 2017 WI 46, 375 Wis. 2d 1; *Easterling v. LIRC*, 2017 WI App 18, 374 Wis. 2d 312.
 - a. Suspends benefits until seven weeks have elapsed since the week of discharge *and* wages equal to 14 times the weekly benefit rate have been earned.
 - b. Unlike misconduct, when discharge is for substantial fault, the wages earned for work with the employer are included in the wage base of the employee that is used to determine the employee's benefit entitlement; however, benefits paid when claimant requalifies are not charged to the discharging employer.
 - c. *Substantial fault* includes those acts or omissions of an employee over which the employee exercised reasonable control and that violate reasonable requirements of the employer, but does not include
 - (1) One or more minor infractions of rules unless an infraction is repeated after warning;

In general, it seems that an infraction that is repeated and leads to a discharge is usually considered by the employer to be a major infraction, not a minor infraction. For this reason, the issue of repeated minor infractions rarely appears; rather, in most cases involving infractions, either the claimant is guilty of misconduct or the alleged infraction was unintentional and so was subject to the inadvertent-error analysis. The few cases in which the issue of repeated minor infractions has appeared are *Deglow v. Muscoda Protein Products*, UI Dec. Hearing No. 15001774MD (LIRC Sept. 25, 2015) (holding that employee's negligence in not following employer rule

constituted substantial fault because employee repeated minor rule infractions after warning), *Kottwitz v. Pick N Save Mega Foods*, UI Dec. Hearing No. 14003386MD (LIRC Jan. 30, 2015) (finding employee with cognitive impairments who was upset and swore at supervisor who first swore at him was guilty of nothing more than a minor infraction not repeated after warning, and observing that warning from three years previously about swearing was too remote in time), and *Winski v. Cotton Exchange Inc.*, UI Dec. Hearing No. 14601789MW (LIRC June 27, 2014) (finding that employee's discharge for taking home old, "crinkled-up" piece of cake was not substantial fault because "there is no record evidence of any rules of the employer pertaining to either of the employee's actions. Second, even if there were, there is no record evidence of any warnings to the employee, and the employee's infractions were minor. They therefore would have fallen under the subdivision 1. exception [minor rule infraction without prior warning] to the definition.").

- (2) One or more inadvertent errors made by the employee; or

The DWD's original application of substantial fault considered inadvertent errors to occur only when the claimant had no ability to prevent those errors from happening. Two appellate decisions established that accidental or unintentional actions by an employee can qualify as inadvertent errors and so prevent application of the substantial-fault disqualification.

In *Operton v. LIRC*, 2017 WI 46, 375 Wis. 2d 1, a store cashier made a few cash-handling errors (out of tens of thousands of transactions) after being warned to avoid such errors and was discharged. The supreme court affirmed a court of appeals finding of inadvertent error.

Under [Wis. Stat.](#) § 108.04(5g)(a)2., an employee's termination is not for substantial fault if the termination resulted from one or more inadvertent errors. Inadvertence is defined as "[a]n accidental oversight; the result of carelessness." *Inadvertence*, Black's Law Dictionary, 827 (9th ed. 2009); see also *Queen Ins. Co. of Am. v. Kaiser*, 27 Wis. 2d 571, 577 135 N.W.2d 247 (1965) (concluding that "an inadvertent act of omission" was only "passive negligence" or "the failure to do something that should have been done"). The DWD's comment about these substantial fault provisions explained that this paragraph exempts "[u]nintentional mistakes made by the employee" from the definition of substantial fault. Department of Workforce Development, *Analysis of Proposed UI Law Change*, D12-01 (October 24, 2012). Consequently, the words of the statute require courts to examine the circumstances surrounding an employee's error to determine if it was careless or unintentional.

Operton, 2017 WI 46, ¶ 44, 375 Wis. 2d 1 (footnote omitted). Because LIRC found that the errors were neither intentional nor willful, *id.* ¶ 48, and because the errors were not so egregious as to be transformed into reckless or intentional conduct, *id.* ¶ 50, the court concluded that there was no basis for finding that the errors were anything other than inadvertent.

In *Easterling v. LIRC*, 2017 WI App 18, 374 Wis. 2d 312, LIRC found that a wheelchair-accessible-transportation company's employee's negligence in failing to properly secure a van passenger, while not misconduct, counted as substantial fault. The court of appeals reversed, holding that negligence for the purposes of

misconduct also qualifies as an inadvertent error for the purposes of substantial fault. *Id.* ¶¶ 16-21.

CAUTION: An inadvertent error that causes substantial damage to an employer's property, however, will qualify as misconduct. *See supra* para. 1.c.(2).

- (3) Any failure of the employee to perform work because of insufficient skill, ability, or equipment. [Wis. Stat.](#) § 108.04(5g).

In *Campo v. Park Towne Management Group*, UI Dec. Hearing No. 14000528MD (LIRC June 27, 2014), LIRC explained that exclusion from substantial fault of “[o]ne or more inadvertent errors made by the employee” refers to one or more unintentional acts or omissions properly described as errors, as opposed to rule infractions, that arose in this case because the claimant lacked the skill and ability to perform the job duties in question.

A lack of skill can also relate to a new skill not yet learned. *Sokolik v. QueenB Television LLC*, UI Dec. Hearing No. 15201712EC (LIRC Nov. 19, 2015) (finding that longtime “employee’s failure to obtain the new skills required to perform his job, even if partially due to his own lack of initiative, was not a circumstance constituting substantial fault”); *Ahler v. Ashley Furniture Indus. Inc.*, UI Dec. Hearing No. 14200042EC (LIRC Apr. 16, 2014) (concluding that employee demonstrated that the production errors were caused by equipment failure and not him, and so there was no substantial fault).

3. Disciplinary suspension for good cause connected with work suspends benefits for the duration of the suspension, for up to three weeks from the end of the week in which suspension occurs. [Wis. Stat.](#) § 108.04(6).
 - a. Includes suspensions *with pay*. *City of Kenosha v. LIRC*, 2000 WI App 131, 237 Wis. 2d 304.
 - b. Employer’s reason for suspending the employee must involve employee’s specific conduct that is directly “connected with the employee’s work” under [Wis. Stat.](#) § 108.04(6); the fact that internal investigations, hearings, or final disciplinary decisions related to the conduct are pending does not remove the suspension from the statute; however, there must still be culpable conduct by the employee constituting good cause for the suspension, and the employer must prove that by competent evidence. *Milwaukee Cnty. v. LIRC*, 2014 WI App 55, ¶ 23, 354 Wis. 2d 162.
4. Voluntary termination or quitting. [Wis. Stat.](#) § 108.04(7); *Nottelson v. DILHR*, 94 Wis. 2d 106 (1980).
 - a. Suspends benefits until wages equal to at least six times weekly benefit rate have been earned. *Klatt v. LIRC*, 2003 WI App 197, 266 Wis. 2d 1038.

NOTE: Meeting requalifying requirements does not automatically trigger benefits; eligibility depends on losing subsequent employment under nonqualifying circumstances and being monetarily eligible.

- b. Voluntary reduction in hours is a form of voluntary termination. Wages earned from remaining hours cannot be used to requalify if employer notifies employee in writing of effect of [Wis. Stat.](#) § 108.04(7m). [Wis. Stat.](#) § 108.04(7m).
- c. Exceptions to quit disqualification
- (1) *Inverse seniority* (employee leaving instead of another worker being terminated or suspended). [Wis. Stat.](#) § 108.04(7)(am); *Berry v. LIRC*, 213 Wis. 2d 397 (Ct. App. 1997).
 - (2) Good cause attributable to employer actions. [Wis. Stat.](#) § 108.04(7)(b); *Kessler v. Industrial Comm'n*, 27 Wis. 2d 398 (1965); *Farmers Mill, Inc. v. DILHR*, 97 Wis. 2d 576 (Ct. App. 1980). Failure to sign an employee disciplinary form is never an automatic quit without good cause attributable to an employer, when signing the form would not constitute an admission of conduct; it requires an inquiry into whether the employee knew that signing would not be an admission. *Kierstead v. LIRC*, 2012 WI App 57, ¶¶ 25–26, 341 Wis. 2d 343.
 - (3) The claimant was not able to do the work for that employer because of the claimant's health and had no reasonable alternative to quitting. [Wis. Stat.](#) § 108.04(7)(c); see *Gibson v. Manitowoc Cranes, Inc.*, UI Dec. Hearing No. 11403747AP (LIRC Feb. 22, 2012); *Bartczak v. Supreme Cores, Inc.*, UI Dec. Hearing No. 06607150MW (LIRC Feb. 27, 2007); *Baker v. Emmpak Foods Inc.*, UI Dec. Hearing No. 06600842MW (LIRC May 18, 2006); *Kluttermann v. Detjens Country Cutting Inc.*, UI Dec. Hearing No. 05000009JF (LIRC Apr. 15, 2005); *Steffy v. Cole Vision Corp.*, UI Dec. Hearing No. 03609644WK (LIRC Aug. 17, 2004); *Kienow v. White Tornado*, UI Dec. Hearing No. 00609402WK (LIRC Apr. 24, 2001); *Angelo v. Accurate Alignment & Frame Serv., Inc.*, UI Dec. Hearing No. 95401360AP (LIRC Aug. 11, 1995); *Pellicier v. One Hour Martinizing*, UI Dec. Hearing No. 94606141MW (LIRC Feb. 17, 1995).
 - (4) Verified illness or disability of an immediate family member necessitates care for longer than the employer was willing to grant leave. [Wis. Stat.](#) § 108.04(7)(cg).
 - (5) Transferred to shift for which employee lacked child care. [Wis. Stat.](#) § 108.04(7)(cm).
 - (6) Accepted work that could have been refused on the same grounds as under [Wis. Stat.](#) § 108.04(8) or that employee could have refused under [Wis. Stat.](#) § 108.04(9); quit work within the first 30 calendar days after starting. [Wis. Stat.](#) § 108.04(7)(e); *Cornwell Pers. Assocs., Ltd. v. LIRC*, 175 Wis. 2d 537 (Ct. App. 1993).
 - (7) Took work for more pay, more hours, longer term, or closer location—if the work met certain conditions. [Wis. Stat.](#) § 108.04(7)(L).
 - (8) Member of armed forces terminated civilian job held concurrently with military service, because term of service ended. [Wis. Stat.](#) § 108.04(7)(q).
 - (9) Claimant quit because of domestic abuse or personal safety concerns and provided evidence of the abuse or concerns such as a restraining order, a report by a law enforcement agency documenting the abuse or concerns, or evidence of abuse or

concerns provided by a health-care professional or an employee of a domestic violence shelter. [Wis. Stat.](#) § 108.04(7)(s).

- (10) Claimant quit to relocate with spouse because the spouse was a member of the U.S. armed forces on active duty and the U.S. armed forces required the spouse to change his or her place of employment to a place to which it was impractical for claimant to commute. [Wis. Stat.](#) § 108.04(7)(t).
5. Termination by employer or suspension by either employer or employee because of physical inability to perform customary job or unavailability for it, or while employee is on leave of absence, but only eligible if *also* able and available for work in general. Partial wage formula under [Wis. Stat.](#) § 108.05(3) applies as to portions of weeks affected if employee was not able and available to work and missed work for 16 hours or less in the first week suspension, termination, or leave occurs. [Wis. Stat.](#) § 108.04(1)(b); *see Rhinelander Paper Co. v. DILHR*, 120 Wis. 2d 162 (Ct. App. 1984).
6. Lost license suspends benefits for five weeks or until license is reinstated or renewed. Removes wages of employer who suspends or terminates from computation for benefits while suspension, revocation, or nonrenewal of license remains in effect. [Wis. Stat.](#) § 108.04(1)(f); *Milwaukee Cnty. v. DILHR*, 80 Wis. 2d 445 (1977).
7. Temporary help employers and employees may continue an employment relationship over short periods of time without a work assignment if certain conditions are met. Rule provides methodology for determining which party separated employment in temporary help employment. [Wis. Admin. Code](#) ch. DWD 133.

C. Nonseparation Issues [§ 2.63]

1. Labor dispute: Wages from current employer are excluded from the benefit computation during active dispute if employee left or lost employment because of strike or other bona fide labor dispute, excluding lockouts not occurring directly after a strike or other employee job action. [Wis. Stat.](#) § 108.04(10); *Brauneis v. LIRC*, 2000 WI 69, 236 Wis. 2d 27; *Kansas City Star Co. v. DILHR*, 60 Wis. 2d 591 (1973); *Trinwith v. LIRC*, 149 Wis. 2d 634 (Ct. App. 1989); *Kubsch v. Manitowoc Cranes Inc.*, UI Dec. Hearing No. 12400741APG (LIRC. Dec. 7, 2012); *Suhr v. Lippert Tile Co.*, UI Dec. Hearing No. 12602681MWG (LIRC Nov. 6, 2012).

NOTE: Employees who do not participate in a strike and who lose employment as a result of a labor dispute receive the same treatment as participants. *Cook v. Industrial Comm'n*, 31 Wis. 2d 232 (1966).

2. Failure without good cause to accept work suspends benefits until wages equal to at least six times weekly benefit rate have been earned. [Wis. Stat.](#) § 108.04(8)(a), (9); *Hubert v. LIRC*, 186 Wis. 2d 590 (Ct. App. 1994).
 - a. Failure without good cause to return to work with former employer that provides due notice to employee within 52 weeks after employee last worked for that employer (if employee receives actual notice, [Wis. Stat.](#) § 108.04(8)(a) applies) suspends benefits as under that subsection. This does not apply to an employee who fails to return to work with a former employer if the work offered would not be considered suitable work under [Wis. Stat.](#) § 108.04(8)(d) or (dm), whichever is applicable. [Wis. Stat.](#) § 108.04(8)(c); *Pinkos v.*

Burgess Car & Truck Serv. Ctr., Inc., UI Dec. Hearing No. 03610313MW (LIRC July 8, 2004).

- b. Canvassing period: For the first six weeks after the employee becomes unemployed, *suitable work* is defined as work that does not involve a lower grade of skill than that which applied to the employee on one or more of his or her most recent jobs, and the hourly wage for the work is 75% or more of what the employee earned on the highest paying of the most recent jobs. After the first six weeks, suitable work means any work the employee is capable of performing, regardless of whether the employee has any relevant experience or training, that pays wages that are above the lowest quartile of wages for similar work in the labor market area in which the work is located, as determined by the DWD. [Wis. Stat.](#) § 108.04(8)(d), (dm); *DILHR v. LIRC*, 193 Wis. 2d 391 (Ct. App. 1995).
- c. Protection of labor standards: Benefits will not be denied for refusing to accept new work if the wages, hours, and other conditions are substantially less favorable than prevailing for similar work, position is vacant because of a labor dispute, or claimant would be required to join company union or refrain from joining bona fide labor organization. [Wis. Stat.](#) § 108.04(9); *Cornwell Pers. Assocs., Ltd. v. LIRC*, 175 Wis. 2d 537 (Ct. App. 1993).
- d. Employer pre-employment drug testing. [Wis. Stat.](#) §§ 108.04(8)(b), 108.133; [Wis. Admin. Code](#) ch. DWD 131.

There is a rebuttable presumption that an employee has failed without good cause to accept suitable work when an employee refuses or fails a pre-employment drug test and that refusal or failure is voluntarily reported to the DWD by an employer. An employee who *refuses* to submit to a pre-employment drug test is ineligible until the employee again qualifies. An employee who *fails* a pre-employment drug test, and lacks a valid prescription for the controlled substance for which the employee tested positive, is ineligible until the employee again qualifies but may remain eligible if the employee enrolls in a substance abuse treatment program and undergoes a job-skills assessment. Benefits paid to a claimant who has requalified will not be charged to an employer's account but will be charged to the fund's balancing account.

3. Work available: Benefit denied for failing to perform work known to be available within week for current employer unless employee misses 16 hours or less of the work available; wages for work not performed are attributed to employee and applied to partial wage formula under [Wis. Stat.](#) § 108.05(3) when employee misses 16 hours or less of work. [Wis. Stat.](#) § 108.04(1)(a)1.

Conversely, if the employee misses 16 or more hours of work in covered employment (for instance, through self-employment or gig work), that employee is declared to have missed too much work to be available for any work in that particular week and so is *not* eligible for any unemployment benefits in the week. See [Wis. Stat.](#) § 108.04(1)(a)2.

4. Able to work and available for work
 - a. Employees are ineligible in any week in which they are unable to work or unavailable for suitable work, except in certain circumstances. Rule provides factors to consider in determining whether employee is able to work and available for suitable work. [Wis. Stat.](#) § 108.04(2); [Wis. Admin. Code](#) ch. DWD 128.

- b. In general, employees are presumed able and available for full-time work. [Wis. Admin. Code](#) § DWD 128.01(2). Furthermore, although full-time work is defined as 32 or more hours of work in a week, [Wis. Stat.](#) § 108.02(15s), claimants who have physical or mental limitations that restrict the number of hours they can work in a week are still able and available for work, as long as those hours constitute some substantial gainful employment and the claimants are willing to work as many hours as they are capable of working. [Wis. Admin. Code](#) § DWD 128.01(3), (4); *see also Kouimelis v. Dennys Rest. 6318*, UI Dec. Hearing No. 12201489EC (LIRC Dec. 4, 2012); *Perkins*, UI Dec. Hearing No. 11605816MW (LIRC Jan. 11, 2012); *Wright v. Independence First Inc.*, UI Dec. Hearing No. 09607759MW (LIRC Mar. 8, 2010) (amended). As set forth in [Wis. Admin. Code](#) § DWD 128.01(4)(a):
- Example 1:** A claimant has a number of physical restrictions due to recent surgery, including a restriction to work no more than 20 hours per week for 2 months. With the restrictions, the claimant cannot perform the duties of his or her usual occupation but is able to perform a number of jobs for which he or she has prior training and experience. The claimant is willing to do these jobs and is willing to work 20 hours per week. The claimant has no other restrictions to availability. Benefits will not be denied solely because of the inability to work full-time.
- c. Only if claimants state that they are unwilling to work all possible hours because of personal reasons (e.g., on vacation that week) or financial reasons (e.g., need to limit their income for eligibility reasons connected to another government benefit) can the DWD conclude claimants are not able and available for work. As long as claimants are willing to work to what their physical and psychological limitations will allow, they are able and available for full-time work for the purpose of unemployment law.
- d. Employee may be eligible even if not able and available for work if employee is in approved training. [Wis. Stat.](#) § 108.04(16).
- e. Claimant is not eligible for benefits in a week in which the claimant is located in a country other than the United States or Canada for more than 48 hours unless specific conditions apply. [Wis. Stat.](#) § 108.04(2)(ae); *Medina v. Fahrner Asphalt Sealers LLC*, UI Dec. Hearing No. 16000211MD (LIRC May 26, 2016).
5. Educational employees between terms are ineligible if reasonably assured of substantially similar work when school resumes. [Wis. Stat.](#) § 108.04(17); *DILHR v. LIRC*, 161 Wis. 2d 231 (1991); *Leissring v. DILHR*, 115 Wis. 2d 475 (1983); *Ashleson v. LIRC*, 216 Wis. 2d 23 (Ct. App. 1997); *Bunker v. LIRC*, 197 Wis. 2d 606 (Ct. App. 1995); *Wanish v. LIRC*, 163 Wis. 2d 901 (Ct. App. 1991); *Barnett v. LIRC*, 131 Wis. 2d 416 (Ct. App. 1986); [Wis. Admin. Code](#) § DWD 132.04.
6. “Illegal alien’s” wages excluded unless, when services were performed, employee was either lawfully admitted for permanent residence or residing in U.S. under color of law. [Wis. Stat.](#) § 108.04(18); *Pickering v. LIRC*, 156 Wis. 2d 361 (Ct. App. 1990).
7. Professional athletes between sports seasons are ineligible if they are reasonably assured of performing the same services in the next sports season. [Wis. Stat.](#) § 108.04(19).
8. Employee is not eligible for benefits in a week if, for 32 or more hours in that week, the employee performs work, has wages, or receives holiday, vacation, termination, or sick pay. [Wis. Stat.](#) § 108.05(3)(c).

9. Employee is not eligible for benefits in a week the claimant conceals holiday, vacation, termination, or sick pay or wages or hours worked. [Wis. Stat.](#) § 108.05(3)(d).
10. Employee is not eligible for benefits when the claimant receives Social Security Disability Insurance (SSDI) benefits. [Wis. Stat.](#) § 108.04(12)(f).
11. Back pay is considered wages when determining eligibility for weeks affected. [Wis. Stat.](#) § 108.05(6).
12. Family-controlled employment (base-period wages limited to 10 times weekly benefit rate when for services for certain family businesses and family members). [Wis. Stat.](#) § 108.04(1)(g), (gm).
13. Per [Wis. Stat.](#) § 108.02(15), certain categories of work do not earn credit for U.I. benefits, even if performed for a covered employer.
 - a. Agricultural labor. [Wis. Stat.](#) § 108.02(15)(k)1.
 - b. Religious work for a church or nonprofit organization operated by a church primarily for religious purposes. [Wis. Stat.](#) § 108.02(15)(h); *Soldiers of Jesus Christ, Inc. v. LIRC*, No. 99-0846, 1999 WL 1059830 (Wis. Ct. App. Nov. 23, 1999) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
 - c. Other seasonal work. [Wis. Stat.](#) § 108.066.
 - d. Commission-only insurance. [Wis. Stat.](#) § 108.02(15)(k)6.
 - e. Certain direct sales. [Wis. Stat.](#) § 108.02(15)(k)16.
 - f. Real estate sales by a licensed real estate licensee in certain circumstances. [Wis. Stat.](#) § 108.02(15)(k)7.
 - g. Work for child or spouse or, if under 18, for parent. [Wis. Stat.](#) § 108.02(15)(k)11.
 - h. Independent contracting: The employing unit receiving services must show that individual was providing services for pay. [Wis. Stat.](#) § 108.02(12)(bm), (c); [Wis. Admin. Code](#) chs. DWD 105, DWD 107.
 - (1) For services performed before December 31, 2010, individual meets 7 or more of the 10 criteria listed in [Wis. Stat.](#) § 108.02(12)(bm) (2007–08) (regarding employees other than loggers, truckers, and those working for governmental units and nonprofits). [Wis. Stat.](#) § 108.02(12)(bm); see 2009 Wis. Act 287.

NOTE: The statutory provisions that exclude independent contractors from U.I. coverage, see [Wis. Stat.](#) § 108.02(12), were modeled in part after the definition of *independent contractor* in the Worker's Compensation Act, see [Wis. Stat.](#) § 102.07(8)(b). The U.I. statute also provides a separate definition for individuals performing services for a governmental unit or nonprofit organization and for loggers and truckers performing services for any employing unit. See [Wis. Stat.](#) § 108.02(12)(c).

- (2) For services performed after December 31, 2010, individual meets the two-part test set out in [Wis. Stat.](#) § 108.02(12)(bm) (regarding employees other than loggers, truckers, and those working for governmental units and nonprofits). *Varsity Tutors v. LIRC*, No. 2018AP1951, 2019 WL 5151324 (Wis. Ct. App. Oct. 15, 2019) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)); *Lady Jane's Milwaukee WI, LLC*, UI Dec. Hearing No. S1600249AP (LIRC June 12, 2020); *Bentheimer v. Bankers Life & Cas. Co.*, UI Dec. Hearing No. 10006546JV (LIRC Aug. 16, 2011).

NOTE: The DWD has a website to help employers and workers determine whether they meet the statutory tests for employee or independent contractor: DWD, *Unemployment Insurance—Worker Classification*, <https://dwd.wisconsin.gov/worker-classification/ui> (last visited May 17, 2022).

- (3) For services performed by loggers, truckers, and those working for governmental units and nonprofits, individual meets the two-part test set out in [Wis. Stat.](#) § 108.02(12)(c). [Wis. Stat.](#) § 108.02(12)(c); *DWD v. LIRC (Dunham Express)*, 2010 WI App 123, 329 Wis. 2d 67; *Islami v. Jet Intermodel, Inc.*, UI Dec. Hearing No. 11610807MW (LIRC Sept. 20, 2012); *Day v. Wel Cos.*, UI Dec. Hearing No. 13602608MW (LIRC Sept. 20, 2013); [Wis. Admin. Code](#) chs. DWD 105, DWD 107.
- (4) Services performed by drivers for Lyft digital network are independent contractors. [Wis. Stat.](#) § 440.40; *Ebenhoe v. Lyft, Inc.*, UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017).

ALERT: On March 17, 2022, LIRC ruled that Lyft drivers are employees under [Wis. Stat.](#) § 108.02(12)(a) for purposes of unemployment law and remanded for further evidence to determine whether the employer could establish that the driver was an independent contractor pursuant to Wis. Stat. § 108.02(12)(bm). *Wilson v. Lyft Inc.*, UI Dec. Hearing No. 21011105MD (LIRC Mar. 17, 2022), <https://wisconsinui.files.wordpress.com/2022/03/lirc-21011105md-lyftemployee.2022.03.17.pdf>. The author represents the claimant in this case.

- i. Personal care or companionship services provided to an ill or disabled family member who is the employing unit. [Wis. Stat.](#) § 108.02(15)(km).
- j. Services performed by an inmate in a state or federal prison unless the employer elects otherwise. [Wis. Stat.](#) § 108.02(15)(kt).
14. Benefit reductions or offsets. *See, e.g., McGraw-Edison Co. v. DILHR*, 72 Wis. 2d 99 (1976).
- a. Worker's compensation paid under Wisconsin law only or other U.I. [Wis. Stat.](#) § 108.04(12).
- b. Holiday or vacation pay if properly allocated by employer and meets statutory conditions. [Wis. Stat.](#) § 108.05(4).
- c. Pension payments (except Social Security). [Wis. Stat.](#) § 108.05(7).
- d. Bonuses. [Wis. Stat.](#) § 108.05(3)(e).

- e. Termination pay. [Wis. Stat.](#) § 108.05(5).
 - f. Sick pay. [Wis. Stat.](#) § 108.05(5m).
 - g. Back pay. [Wis. Stat.](#) § 108.05(6).
15. Fraud: Intentional concealment of material facts, false reporting, or aiding and abetting such concealment or false reporting may result in benefit disqualification and penalties, as well as civil and criminal penalties. [Wis. Stat.](#) § 108.04(11).

The changes in concealment created by 2015 Wis. Act 334 mean that a claimant “has a duty of care to provide an accurate and complete response to each inquiry made by the department in connection with his or her receipt of benefits” and that there is no requirement “when making a finding of concealment, to determine or prove that a claimant had an intent or design to receive benefits to which the claimant knows he or she was not entitled.” See [Wis. Stat.](#) § 108.04(11)(g)2., 3., *created by* 2015 Wis. Act 334. The DWD routinely presumes fraudulent intent from any claim-filing mistakes, and the burden is then on claimants to explain why that mistake was not intentional on their part.

CAVEAT: By removing the requirement of finding that a claimant is knowingly seeking benefits the claimant knows he or she is not entitled to receive, this redefinition of concealment conflicts with other provisions—specifically, requirements in disaster unemployment assistance (DUA) regulations (which cover pandemic unemployment assistance (PUA) benefits), *see* 20 [C.F.R.](#) § 625.14(i) (disqualifying individual for fraud committed “in order to obtain for the individual or any other person a payment of DUA to which the individual or any other person is not entitled”), as well as federal law for pandemic unemployment compensation (PUC) and pandemic emergency unemployment compensation (PEUC) benefits, *see* Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, §§ 2104(f)(1), 2107(e)(1), 134 Stat. 281 (2020) (creating 15 [U.S.C.](#) § 9023(f)(1); 15 [U.S.C.](#) § 9025(e)(1)) (defining relevant unemployment-fraud provision as when a claimant “knowingly” makes false statements for purposes of PUC or PEUC benefits).

When charged, concealment under [Wis. Stat.](#) § 108.04(11) puts claimants at risk of incurring three separate penalties: (1) loss of all unemployment benefits owed the claimant for each week of alleged unemployment fraud; (2) a 40% administrative penalty (consisting of a 15% charge that goes to the unemployment insurance trust fund and a 25% charge that goes to the DWD’s unemployment program integrity fund) for each week of alleged unemployment fraud, *see* [Wis. Stat.](#) § 108.04(11)(bh); and (3) a forfeiture of future unemployment benefits, called a benefit amount reduction, that is two times, four times, or eight times a claimant’s weekly benefit rate for each week of alleged unemployment fraud.

16. Overpayments

- a. Benefits are paid after any adjudication that finds eligibility. Subsequent reversal may mean overpayment is created. [Wis. Stat.](#) § 108.09(9)(a), (c).
- b. No overpayment is created if employer is at fault and employee is not at fault for erroneous payment of benefits. [Wis. Stat.](#) § 108.04(13)(c).

- c. Overpayment “written off” only when certified uncollectible. [Wis. Stat.](#) § 108.16(3); *Topp v. LIRC*, 133 Wis. 2d 422 (Ct. App. 1986). Collection efforts are no longer halted, however.
 - d. When overpayment is caused by “departmental error,” and employee was not at fault (reversal at higher level of appeal is not departmental error, *see* [Wis. Stat.](#) § 108.22(8)(c)2.), recovery of overpayment may be waived. [Wis. Stat.](#) §§ 108.02(10e), 108.22(8)(c); *DWD v. LIRC (Morse)*, 2017 WI App 68, 378 Wis. 2d 226. *But see* [Wis. Stat.](#) § 108.02(10e)(c), *created by* 2021 Wis. Act 231 (“‘Departmental error’ does not include an error made by an appeal tribunal appointed under s. 108.09(3).”).
 - e. An overpayment of federally funded benefits (PUC, PEUC, and PUA) may be waived because of equity and good conscience. *See infra* § [2.35](#).
17. Drug testing of claimants whose only suitable work is in an occupation that regularly conducts drug testing. [Wis. Stat.](#) § 108.133.

NOTE: The DWD must adopt rules to establish a drug-testing program to test claimants who apply for regular benefits for the unlawful use of controlled substances, including the creation of a process to test claimants, the parameters for a substance abuse treatment program, a screening process to determine whether there is a reasonable suspicion that a claimant has used controlled substances, parameters for a job-skills assessment for claimants who engage in use of controlled substances, and a period of ineligibility. The drug-testing program should conduct screenings on claimants for whom suitable work is available only in occupations that regularly conduct drug testing. Drug testing must comply with the federal Substance Abuse and Mental Health Services Administration (SAMHSA) testing guidelines. A claimant who *refuses* a drug test is ineligible for benefits as provided in the DWD rules. A claimant who *fails* a drug test, and does not possess a valid prescription for the controlled substance for which the claimant tested positive, may maintain eligibility for benefits by enrolling in a substance abuse treatment program and undergoing a job-skills assessment. The drug-testing provisions are effective when the DWD adopts the rules to establish the program; the DWD must notify the Wisconsin Legislative Reference Bureau when the provisions will be effective.

V. INITIAL DETERMINATION [§ 2.64]

See [Wis. Stat.](#) § 108.09(9) regarding benefit eligibility and [Wis. Stat.](#) § 108.10 regarding employer liability.

A. Investigation [§ 2.65]

1. Employer coverage or employee eligibility investigated by auditor or U.I. adjudicator.
2. Parties interviewed by phone.
3. If medical issues are involved, claimant submits doctor-certified report, DWD form UCB-474. [Wis. Stat.](#) § 108.09(4m).
4. Parties may present documentary evidence to adjudicator.
5. All statements are recorded on DWD form UCB-157 by adjudicator or parties.

B. Appealable Document Issued [§ 2.66]

1. After investigation, adjudicator issues a formal, appealable initial determination of benefit eligibility. [Wis. Stat.](#) § 108.09(2).

NOTE: During the pandemic, the DWD began issuing computations, overpayment notices, and preliminary eligibility decisions as nonappealable decisions for which an “objection” (instead of an appeal) could be lodged. A person who mistakenly “appeals” instead of “objects” (or “objects” instead of “appeals”) can easily then miss the timeline for filing a proper objection or appeal. Pursuant to [Wis. Stat.](#) § 108.09(2)(b), the DWD must “issue determinations whenever necessary to resolve any matters that may bar, suspend, terminate or otherwise affect the employee’s eligibility for benefits.” So, a proper objection should lead to the issuance of an appealable determination.

2. After investigation, DWD may issue an initial determination on employer liability. [Wis. Stat.](#) § 108.10(1).
3. Copies mailed or electronically delivered to parties and their attorneys (at address on record with DWD). [Wis. Stat.](#) §§ 108.09(2)(d), 108.10(1) (for employer liability).
4. DWD may amend determinations. [Wis. Stat.](#) § 108.09(2)(a), (c).
 - a. Within 14 days to correct a computation error. [Wis. Stat.](#) § 108.09(2)(a).
 - b. Within two years, if no appeal is taken, on the basis of subsequent information or to correct a mistake, including an error of law. [Wis. Stat.](#) § 108.09(2)(c).
 - c. At any time, if no appeal is taken, (1) for fraud or concealment or (2) if benefits paid or payable to claimant are affected by wages that have not been paid and DWD is notified by court or agency that wage claim will not be paid in whole or in part. [Wis. Stat.](#) § 108.09(2)(c).
 - d. For nonbenefit claims, any time before a hearing on the basis of subsequent information or to correct a mistake, including an error of law. [Wis. Stat.](#) §§ 108.09(2)(a), 108.10(1).

C. Request for Hearing or Appeal from Initial Determination [§ 2.67]

See [Wis. Stat.](#) §§ 108.09(2r), 108.10(1); [Wis. Admin. Code](#) ch. DWD 140.

1. Must be received by an appeal tribunal within 14 days after date initial determination mailed or electronically delivered; postmark or fax within 14 days will suffice (21 days for employer liability determinations).
2. Must be in writing. May be filed online at DWD, *How to File an Appeal*, <https://dwd.wisconsin.gov/uibola/appeal.htm> (last visited May 17, 2022).
3. Standard for relief from late request for hearing is whether request was delayed because of “reason beyond the party’s control.” [Wis. Stat.](#) § 108.09(4)(c).
4. Hearings may be held on reasons for late appeals at DWD’s discretion.

a. Standard: Delay for reason beyond person's control

A late appeal is extremely difficult to overcome. The standard for excusing a failure to timely appeal a DWD determination is whether the late appeal was for a reason beyond the person's control. *Kosmoski*, UI Dec. Hearing No. S9900245MW (LIRC Mar. 22, 2000), <https://lirc.wisconsin.gov/ucdecsns/854.htm> (concluding that individual charged with tax liability who was preoccupied with caring for close relative dying from lung cancer missed appeal deadline for reasons that were not beyond his control).

b. Medical certification required to establish physical or psychological conditions asserted as reasons for delay

An assertion of confusion, disability, excusable neglect, or mental illness will not qualify as a reason beyond a person's control unless a medical provider can certify that this reason directly prevented the person from filing a timely appeal. *Sandoval v. D.R. Diedrich & Co.*, UI Dec. Hearing No. 17604105MW (LIRC Jan. 19, 2018), <https://lirc.wisconsin.gov/ucdecsns/4208.htm> (“A certified medical opinion that a physical or psychological condition prevented the employee from meeting an appeal deadline constitutes a reason beyond the party's control for failing to meet that deadline.”); *see also Ellis v. Ho Chunk Nation*, UI Dec. Hearing No. 09001719 (LIRC July 15, 2009), <https://lirc.wisconsin.gov/ucdecsns/3351.htm> (noting that “the same circumstances [a stroke] that prevented the employee from filing a timely appeal also prevented her from making arrangements to have someone else do it for her,” and amounted to a reason beyond her control).

c. Mail-delivery delays

Because mail is presumed to arrive as addressed, parties cannot simply claim they did not receive a DWD determination in time to file an appeal. *Hawthorne v. Triangle Mech. Inc.*, UI Dec. Hearing No. 09000775MD (LIRC May 8, 2009), <https://lirc.wisconsin.gov/ucdecsns/3324.htm> (holding that mail delivery is presumed and determining that no evidence was presented to rebut that presumption). Indeed, claimants and employers both must make arrangements for their mail during any absences or delays in receiving their mail. *See In re Thorison*, UI Dec. Hearing No. 07400610AP (LIRC May 17, 2007), <https://lirc.wisconsin.gov/ucdecsns/2849.htm>. A party claiming a lack of delivery must demonstrate that lack of mail delivery at a hearing. *See Soto v. Staff Mgmt.*, UI Dec. Hearing No. 03404410AP (LIRC May 14, 2004), <https://lirc.wisconsin.gov/ucdecsns/1977.htm> (concluding that, in case in which initial determination was mailed while claimant was incarcerated but was not included in the mail that had accumulated in her absence, claimant's failure to timely appeal was for reason beyond her control); *Schultz v. Mortgage Counselors Inc.*, UI Dec. Hearing No. 99605190MW (LIRC Nov. 24, 1999), <https://lirc.wisconsin.gov/ucdecsns/730.htm> (allowing late appeal after claimant testified about initial determination delivered after appeal deadline had expired).

d. Reliance on mistaken DWD advice

Mistaken DWD advice on which claimants rely to their detriment is also a reason beyond their control, providing good cause for a late appeal or petition for LIRC review. *Santner v. Cherry Hills Lodge & Golf*, UI Dec. Hearing No. 09402999AP (LIRC Jan. 29, 2010), <https://lirc.wisconsin.gov/ucdecsns/3440.htm> (concluding that employee's late request for

hearing was for reason beyond her control when claim specialist erroneously said appeal deadline would be extended 30 more days); *Brice v. Z Harvest Cafe LLC*, UI Dec. Hearing No. 99001904MD (LIRC Aug. 25, 1999), <https://lirc.wisconsin.gov/ucdecsns/388.htm> (concluding that reason for delay was beyond employee's control after claims specialist incorrectly said issue in determination had no effect on eligibility claim); *see also Garner v. Professional Servs. Grp. Inc.*, UI Dec. Hearing No. 11602744MW (LIRC July 22, 2011), <https://lirc.wisconsin.gov/ucdecsns/3655.htm> (describing complicated set of cases withdrawn and then appealed because of bad advice).

e. Communication meltdowns

Communication meltdowns can also constitute a reason beyond a person's control for a late appeal. In *Martin v. SL Bayshore Oshkosh LLC*, UI Dec. Hearing No. 20401617AP (LIRC Aug. 7, 2020), <https://lirc.wisconsin.gov/ucdecsns/4249.pdf>, LIRC found that a person's delay in filing a timely appeal because of DWD communication breakdowns was for a reason beyond her control.

f. Confusion over conflicting or ambiguous determinations

Confusion over conflicting or ambiguous determinations may also qualify as a reason beyond a person's control for a late appeal. In *Schiffman*, UI Dec. Hearing No. 20013787MD (LIRC Mar. 26, 2021), <https://lirc.wisconsin.gov/ucdecsns/4280.pdf>, the claimant was approved for regular unemployment and so did not appeal a denial of PUA eligibility. When the DWD reversed the claimant's eligibility for regular unemployment benefits, the claimant promptly filed a late appeal of the PUA eligibility determination, and LIRC found that the appeal was late for reasons beyond the claimant's control and not because of a lack of diligence. *See also Wiles v. US Paper Converters Inc.*, UI Dec. Hearing No. 02401090AP (LIRC Apr. 23, 2002), <https://lirc.wisconsin.gov/ucdecsns/1359.htm> ("At least since 1988, the commission has held in this circumstance that the subsequent receipt of a decision which states without qualification that benefits are allowed, is a reason beyond control for a failure to have timely appealed a prior decision which denied benefits.").

VI. HEARING BEFORE DWD APPEAL TRIBUNAL [§ 2.68]

See Wis. Stat. § 108.09(5); *Wis. Admin. Code* ch. DWD 140.

A. Before Hearing [§ 2.69]

1. Limited discovery. *Wis. Admin. Code* § DWD 140.09.
 - a. Examination of hearing file is sole means of discovery before hearing unless appeal tribunal orders otherwise.
 - b. Parties and their attorneys may inspect investigation statements and documents—arrange with hearing office manager before day of hearing.
 - c. *Wis. Stat.* ch. 804 provisions for discovery do not apply.
2. Subpoenas. *Wis. Admin. Code* §§ DWD 140.10, DWD 140.20.

- a. May be obtained from hearing office.
 - b. Witness fees (\$16) and travel fees (20 cents per mile) must be advanced by party requesting subpoena; appeal tribunal may require DWD to reimburse party.
3. Notice of hearing. [Wis. Admin. Code](#) § DWD 140.06.
 - a. May be as short as six calendar days.
 - b. Postponements granted only for exceptional reasons. [Wis. Admin. Code](#) § DWD 140.08(2).
 4. Prehearing conference—Appeal tribunal may direct prehearing conference in complex cases or in certain other circumstances. [Wis. Admin. Code](#) § DWD 140.07.

B. At Hearing [§ 2.70]

1. Admissibility of evidence. *See Pieper Elec., Inc. v. LIRC*, 118 Wis. 2d 92 (Ct. App. 1984); [Wis. Admin. Code](#) § DWD 140.16.
 - a. Statutory and common-law rules of evidence and technical rules of procedure do not control at hearings.
 - b. Hearsay may be admitted, but the decision cannot be based solely on uncorroborated hearsay because it is not considered “substantial evidence,” except for issue of employer fault for failing to provide correct and complete information at a fact-finding investigation. *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, 278 Wis. 2d 111; *see Wis. Stat.* § 108.09(4o).
 - c. Initial investigation statements and file documents are not evidence unless they are received into evidence at hearing. *Appleton Elec. Co. v. Minor*, 91 Wis. 2d 825 (1979).
 - d. An affidavit of a person with personal knowledge of relevant facts obtained through first-hand observation or experience that is presented on a DWD standard affidavit form that meets certain requirements may be admitted by the appeal tribunal, but the affidavit is still considered hearsay. The opposing party can cross-examine the person giving the affidavit, and no issue in the hearing may be decided solely on the affidavit without additional first-hand witness testimony. To obtain the DWD’s standard affidavit form, call (608) 266-8010 or visit the website, <https://dwd.wisconsin.gov/dwd/forms/ui/pdf/ucl-17500-e.pdf> (revised Dec. 2014). [Wis. Stat.](#) § 108.14(26); [Wis. Admin. Code](#) §§ DWD 140.16, DWD 140.22.
 - e. During the pandemic, it has become almost routine for administrative law judges (ALJs) to announce that they are taking administrative notice, *see Wis. Admin. Code* § DWD 140.16(2), of DWD records and even to question witnesses about the contents of these documents. Because these hearings are occurring by telephone, there is no opportunity to see or inspect these records or even to know what is being referred to by the ALJ.

COMMENT: This practice directly contradicts LIRC case law and basic rights to due process. *Shaw v. Dr. Howard L. Fuller Educ. Found. Inc.*, UI Dec. Hearing Nos. 13609591MW, 13609592MW, 13609593MW (LIRC June 12, 2014) (“Like judicial

notice, administrative notice is an exception to the requirement that decisions be based solely upon evidence adduced at a hearing. Its purpose is to enhance adjudicative efficiency without sacrificing adjudicative accuracy.”); *Adell v. Nurses Now LLC*, UI Dec. Hearing No. 07605521MW (LIRC Nov. 9, 2007) (stating that administrative notice, while available in regulations, is only possible when “the parties shall be given an opportunity to object and to present evidence to the contrary before the administrative law judge issues a decision”), *Bohannon v. Cornwell Pers. Assocs. Ltd.*, UI Dec. Hearing No. 03607072MW (LIRC May 6, 2004) (observing that due process requires that parties be given the opportunity to view and object to a document on which a decision is based); *Rommel v. Geo Synthetics Inc.*, UI Dec. Hearing No. 01605139WK (LIRC Sept. 13, 2001) (same).

2. Hearing procedure. [Wis. Admin. Code](#) § DWD 140.15.
 - a. Appeal tribunal may call and examine any witness.
 - b. Appeal tribunal may determine the order in which witnesses are called. *Bunker v. LIRC*, 2002 WI App 216, 257 Wis. 2d 255.
 - c. Appeal tribunal may deny requests to examine witness adversely.
 - d. Witnesses may be sequestered.
 - e. If appellant does not appear, hearing request is dismissed unless there is a good cause for nonappearance. [Wis. Stat.](#) § 108.09(4)(d).
 - f. If respondent does not appear, hearing may proceed, provided that appellant is present. [Wis. Stat.](#) § 108.09(4)(e).
 - g. Hearing is recorded electronically. [Wis. Stat.](#) § 108.09(5)(b).
 - h. Hearings may be conducted in person, by telephone, or by videoconference. [Wis. Admin. Code](#) § DWD 140.11.
3. Hearing decision—appeal tribunal issues written decision containing ultimate findings of fact and conclusions of law. [Wis. Admin. Code](#) § DWD 140.17(2).
4. U.I. decisions have no binding effect in other forums. [Wis. Stat.](#) § 108.101; *Goetsch v. DWD*, 2002 WI App 128, 254 Wis. 2d 807.

C. After Hearing [§ 2.71]

1. Standard for relief from failure to appear is *good cause* (decision as to good cause based on written explanation for not appearing). [Wis. Stat.](#) § 108.09(4)(d), (e); [Wis. Admin. Code](#) § DWD 140.13; see *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468 (1982) (discussing *excusable neglect*, which the court defines as “that neglect which might have been the act of a reasonably prudent person under the same circumstances”; it is “not synonymous with neglect, carelessness or inattentiveness”).
2. Appeal tribunal may amend or set aside at any time to correct clerical or technical mistake unless party or DWD has filed a timely petition for review by LIRC. [Wis. Stat.](#) § 108.09(4)(f)2.

3. If the decision is not petitioned for review by LIRC, the appeal tribunal, on its own motion, may amend or set aside within 21 days after mailing or electronic delivery of decision. [Wis. Stat. § 108.09\(4\)\(f\)1.](#)
4. If the decision is not petitioned for review by LIRC, the appeal tribunal may reopen within two years after date of decision if false evidence affected an issue material to decision. [Wis. Stat. § 108.09\(4\)\(f\)3.](#)
5. Transcripts
 - a. LIRC may obtain a transcript or synopsis of the hearing testimony. [Wis. Stat. § 108.09\(5\)\(b\).](#)
 - b. DWD “shall furnish a copy of the electronic recording to the parties upon payment” of any fee required by rule. [Wis. Stat. § 108.09\(5\)\(c\).](#)
6. Petition for review by LIRC—Appeal from appeal tribunal decision. See [Wis. Stat. § 108.09\(6\)\(a\)](#); [Wis. Admin. Code §§ LIRC 1.02, LIRC 1.025, LIRC 2.01, LIRC 2.015.](#)
 - a. Must be filed with LIRC within 21 days after appeal tribunal decision is mailed or electronically delivered; may mail or may file by fax or through the LIRC website, LIRC, *Appeal a UI Appeal Tribunal Decision to LIRC*, https://lirc.wisconsin.gov/ui_appeal.htm (last visited May 17, 2022).
 - b. Must be in writing, but need not state grounds.
 - c. Standard for relief from late petition is *reason beyond petitioner’s control*.
 - d. DWD or any party may appeal.
7. Attorney fees
 - a. For attorney representing claimant, limited to 10% of the maximum benefits at issue, unless DWD first approves specified higher fee (includes LIRC review but not court review). [Wis. Stat. § 108.09\(8\).](#)
 - b. Contact DWD Bureau of Legal Affairs at (608) 266-0950 or 266-3189 for computation of maximum benefits at issue or to request a higher fee.
 - c. Penalties for terminating, threatening to terminate, discriminating against, or retaliating against person for exercising rights under U.I. law include fines and imprisonment up to 90 days for each violation. [Wis. Stat. § 108.24.](#)

VII. REVIEW BY LIRC [§ 2.72]

See [Wis. Stat. § 108.09\(6\)](#).

A. Makeup of LIRC [§ 2.73]

See [Wis. Stat.](#) §§ 15.06, 15.105(15).

1. Chair and two commissioners
2. Appointed by governor, confirmed by senate, for six-year staggered terms expiring March 1 of odd-numbered years
3. Staff of attorneys assist commissioners with reviews

B. Nature of Review [§ 2.74]

1. May file request for review at LIRC, *Appeal a UI Appeal Tribunal Decision to LIRC*, https://lirc.wisconsin.gov/ui_appeal.htm (last visited May 17, 2022). [Wis. Stat.](#) § 108.09(5)(d); *Vasquez v. DILHR*, 39 Wis. 2d 10, 15 (1968); [Wis. Admin. Code](#) § LIRC 1.04.
2. Based on synopsis of testimony and exhibits from hearing and may include the electronic recording of hearing or transcript.
3. Based on transcript if it was prepared and used by ALJ. [Wis. Admin. Code](#) § LIRC 1.04(2).
4. Briefs. See [Wis. Admin. Code](#) § LIRC 1.07.
 - a. LIRC establishes briefing schedules upon request.
 - b. Parties may obtain copies of synopsis or transcript of testimony, exhibits received at hearing, or other documents in the administrative record from LIRC or copies of digital recording of hearing from DWD Bureau of Legal Affairs. [Wis. Admin. Code](#) § LIRC 1.045; see [Wis. Admin. Code](#) § DWD 140.09(3)(d); see also [Wis. Stat.](#) § 108.09(5)(c) (electronic recording). To request hearing recordings and waivers of fees contact the DWD's UI Bureau of Legal Affairs, 201 E. Washington Ave., P.O. Box 8942, Madison, WI 53708-8942, or telephone (608) 266-3174.
 - c. Extension of time for filing briefs.
 - (1) Request in writing.
 - (2) Granted only for good cause.
5. Further evidence. [Wis. Stat.](#) § 108.09(6)(d).
 - a. LIRC's review is de novo and is based on the record established at the hearing.
 - b. LIRC may direct taking of additional evidence or may remand to DWD for further proceedings.
6. Oral argument is possible if party submits written request and LIRC determines that an issue would be more clearly presented by oral argument, but oral argument is very rarely granted. [Wis. Admin. Code](#) § LIRC 1.06.
7. Decision. *Goranson v. DILHR*, 94 Wis. 2d 537, 545 (1980).

- a. Summary affirmance means LIRC adopts and affirms ALJ's findings.
- b. LIRC makes its own findings of fact and conclusions of law. *Rucker v. DILHR*, 101 Wis. 2d 285 (Ct. App. 1981).
- c. Copies of decision mailed or electronically delivered to parties and attorneys at last-known address with DWD or LIRC.
- d. LIRC is not bound by the ALJ's decision. *Xcel Energy Servs., Inc. v. LIRC*, 2013 WI 64, ¶ 56, 349 Wis. 2d 234.

C. Reconsideration [§ 2.75]

1. LIRC may set aside a LIRC decision on its own motion for any reason within 28 days and take further action. [Wis. Stat. § 108.09\(6\)\(b\)](#).
2. LIRC may set aside any final DWD determination, appeal tribunal decision, or LIRC decision on its own motion within two years based on mistake or newly discovered evidence. [Wis. Stat. § 108.09\(6\)\(c\)](#); *La Crosse Footwear, Inc. v. LIRC*, 147 Wis. 2d 419 (Ct App. 1988).
3. LIRC may set aside any final DWD determination, any appeal tribunal decision, or any LIRC decision at any time if benefits paid or payable to claimant have been affected by wages earned that have not been paid and LIRC is notified by court or agency that wage claim will not be paid in whole or in part. [Wis. Stat. § 108.09\(6\)\(c\)](#).

VIII. JUDICIAL REVIEW [§ 2.76]

A. Commencement of Circuit Court Review [§ 2.77]

See [Wis. Stat. §§ 108.09\(7\), 108.10\(4\)](#).

NOTE: LIRC provides answers to frequently asked questions (FAQs) about appealing a LIRC decision to circuit court on its website at <https://lirc.wisconsin.gov/appeal/newfaqs.htm> (last visited May 17, 2022).

1. Action started by filing *and* serving an authenticated circuit court summons and complaint on LIRC within 30 days after LIRC's decision is mailed or electronically delivered to parties.
 - a. DWD must be named as a defendant in any appeal.
 - b. [Wis. Stat. § 801.02](#) provisions for commencing action do not apply.
 - c. Administrative Procedures Act and [Wis. Stat. ch. 799](#) (small claims) procedures do not apply.
 - d. Court may extend time additional 30 days only if satisfied that party in interest has been prejudiced by exceptional delay in receiving LIRC's decision.

- e. [Wis. Stat.](#) § 801.15(5) provision extending appeal period by three days when service made by mail does not apply. *Schiller v. DILHR*, 103 Wis. 2d 353, 356–57 (Ct. App. 1981).

NOTE: The courts have not yet interpreted whether the [Wis. Stat.](#) § 801.15(5)(b) provision extending the period by one day—in cases of service by fax, email, or electronic filing—applies.

- f. Party in whose favor decision was made must be joined as defendant along with LIRC and DWD. *Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700 (1993); *Brandt v. LIRC*, 166 Wis. 2d 623 (1992).
- g. No fees may be charged by the clerk of any circuit court for performance of any service required for commencing action, and no costs may be taxed against LIRC or the DWD. [Wis. Stat.](#) § 108.09(7)(i).
- h. DWD or any party may appeal. [Wis. Stat.](#) § 108.09(7)(a).
2. Venue. *See* [Wis. Stat.](#) § 108.09(7)(c)2.
- a. In circuit court of the county where plaintiff resides, or
- b. If the plaintiff is the DWD, in the county where any defendant other than LIRC resides.
3. Time limit and joinder requirements are jurisdictional. *Cruz v. DILHR*, 81 Wis. 2d 442, 449 (1978); *Gomez v. LIRC*, 153 Wis. 2d 686 (Ct. App. 1989).
4. Employer whose U.I. account is not affected by LIRC’s decision has no standing to seek judicial review. *Cornwell Pers. Assocs. v. DILHR*, 92 Wis. 2d 53, 62–63 (Ct. App. 1979).

B. Responsive Pleadings [§ 2.78]

See Rathjen v. Industrial Comm’n, 233 Wis. 452, 456–57 (1940).

1. LIRC and other parties must answer within 20 days after service on LIRC. [Wis. Stat.](#) § 108.09(7)(c)4.
2. LIRC may move to dismiss.

C. Pretrial Practice [§ 2.79]

1. Motions to dismiss are handled according to normal motion practice before consideration on merits.
2. LIRC makes return of agency record, including hearing transcript, to court. [Wis. Stat.](#) § 108.09(5)(b).
3. Calendar practice provisions do not apply. [Wis. Stat.](#) § 802.10(1).

PRACTICE TIP: Either LIRC or the DWD will handle the defense of LIRC’s decision in court, although both agencies have their own independent status in the case and can, at times, disagree

with each other. To assist the court, the parties should consult with one another about a proposed briefing schedule that can be submitted when the record is complete.

D. Hearing Practice and Procedure [§ 2.80]

1. Usual practice is for court to set a briefing schedule after receiving the record, although action may be brought for hearing with 10 days' notice by either party after submission of the record.
2. Court acts in appellate capacity on the record made before the agency. *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342 (1973).
3. Evidence is not taken in court on review unless fraud is alleged on the part of LIRC in arriving at its decision. *Weibel v. Clark*, 87 Wis. 2d 696, 708 (1979).
4. Court reviews case on record, briefs, and oral argument if requested by parties or desired by court.
 - a. Oral argument is waived unless requested.
 - b. When scheduled, oral argument is under court's own notice of date.

E. Scope of Review [§ 2.81]

1. Findings of fact made by LIRC are conclusive on review if supported by credible and substantial evidence. [Wis. Stat.](#) § 108.09(7)(f); *Bunker v. LIRC*, 2002 WI App 216, 257 Wis. 2d 255.
2. Credible and substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Per *R.T. Madden, Inc. v. DILHR*, 43 Wis. 2d 528, 547 (1969), assumption in test is that
 - a. Evidence is relevant,
 - b. It is evidentiary and not a conclusion of law, and
 - c. Evidence is not so completely discredited by other evidence that court could find it incredible as a matter of law.
3. All agency conclusions of law are subject to de novo review, which may be supplemented by the agency analysis when certain "due weight" standards are present. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496.

NOTE: The *Tetra Tech* decision changed the previous three-level standard of review set out in *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650 (1995).
4. Review is of LIRC's decision and not appeal tribunal's; if LIRC adopted and affirmed findings and conclusions of ALJ, it made those its own. *Indianhead Truck Lines, Inc. v. Industrial Comm'n*, 17 Wis. 2d 562, 567 (1962); *Hakes v. LIRC*, 187 Wis. 2d 582 (Ct. App. 1994).
5. Court must disregard harmless error by LIRC or DWD.

6. Usual practice is for court to issue memorandum decision.
7. Permitted dispositions. [Wis. Stat.](#) § 108.09(7)(c)6.
 - a. Confirm LIRC decision.
 - b. Set aside LIRC decision.

F. Judgment and Remittitur [§ 2.82]

NOTE: Practice is for court to prepare and enter judgment or direct prevailing party to do so in its memorandum decision.

1. Costs as between parties are within the court's discretion, but no costs may be taxed against LIRC. *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 79 (1972).
2. Judgment becomes final if no appeal is taken to court of appeals within the statutory appeal period. [Wis. Stat.](#) § 808.04(1).

IX. FEDERAL-STATE EXTENDED BENEFITS (EB) [§ 2.83]

1. The EB program is a permanent federal-state program that provides benefits to claimants who have exhausted their regular U.I. benefits during periods of high unemployment. States must offer EB and enact statutory provisions that conform to federal requirements. The EB law has been legislatively amended dozens of times and supplemented by numerous federal "emergency" and other "special" compensation programs. *See, e.g.*, Federal State Unemployment Compensation Act of 1970, Pub. L. No. 91-373 (FSUCA); I.R.C. § 3304 notes; [Wis. Stat.](#) § 108.141.
2. The EB period is the period during which eligible EB claimants may be paid benefits through the EB program. Federal law prescribes the state "on" and "off" indicators (triggers) that determine when EB periods begin and end. The EB period begins 3 weeks after triggering on and ends 3 weeks after triggering off. The EB period must remain on for at least 13 weeks. [Wis. Stat.](#) § 108.141(1)(b), (c), (e), (f).
3. The weekly benefit rate (WBR) for claimants is the same as under the regular benefit program. [Wis. Stat.](#) § 108.141(4).
4. Wisconsin adopted temporary EB triggers to allow for additional benefits while the federal government funds benefits through the EB program at 100%. [Wis. Stat.](#) § 108.141(1)(f), (5).
5. To qualify for benefits through the EB program in a given week, a claimant must have exhausted all rights to regular benefits under state law and have no rights to regular benefits under any other state U.I. law or under any federal law (e.g., military, federal employees). [Wis. Stat.](#) § 108.141(1)(b).
6. The EB program has very strict work-search and disqualification requirements for claimants. [Wis. Stat.](#) § 108.141(3g).

7. Under the standard EB program, the federal government pays 50% of the cost of benefits paid under the EB program, except the federal government will not pay for 50% of the benefits for the first week of benefits in a state without a waiting week. The federal government also does not pay EB costs for state and local governments or Indian tribes. FSUCA § 204.

NOTE: In 2019 Wis. Act 185, the legislature provided that the employer's share of some EB program benefits will not be charged to the individual employers but will be charged to other accounts. [Wis. Stat.](#) § 108.141(7)(a). In 2021 Wis. Act 4, the legislature provided that the Secretary of the DWD may waive certain statutory prohibitions so as to allow the state to take advantage of additional EB program benefits supported by federal funds.

X. COVID-19 PANDEMIC [§ 2.84]

A. Federal Response [§ 2.85]

1. In General

- a. In response to the COVID-19 pandemic, Congress passed laws in 2020 that temporarily affected unemployment benefit amounts and eligibility. There are essentially three kinds of relief created during the pandemic, and it is vital that representatives understand the various distinctions on how or when these programs apply.
 - (1) Expansions and extensions of regular unemployment benefits: emergency regulations and orders that expanded eligibility to claimants who lost work because of the pandemic and PEUC and extended-benefit (EB) programs that extended eligibility after regular unemployment benefits ran out.
 - (2) Supplemental benefit programs (PUC and lost wages assistance (LWA): payments offered to claimants who receive some other unemployment benefit or mixed-earners unemployment compensation (MEUC) benefits for claimants receiving regular unemployment benefits or PEUC benefits who also have income from self-employment.
 - (3) A new kind of unemployment benefit for those who cannot receive regular unemployment benefits: PUA benefits to those claimants not eligible for regular unemployment benefits who also suffered pandemic-related job losses.
- b. The CARES Act, Pub. L. No. 116-136, §§ 2101–2116, 134 Stat. 281, 313–35 (2020) (Relief for Workers Affected by Coronavirus Act), <https://www.congress.gov/116/plaws/publ136/PLAW-116publ136.pdf> (codified in part at 15 [U.S.C.](#) §§ 9021–9032), created PUA benefits, PEUC benefits, PUC benefits, and the federal funding for EB program benefits and other changes. When the \$600 PUC supplemental benefit ended the week ending July 25, 2020, an executive order pulled money from FEMA to create a \$300 supplemental LWA benefit for six weeks, the weeks ending August 1, 2020, to September 5, 2020.
- c. The Continued Assistance for Unemployed Workers Act of 2020, Pub. L. No. 116-260, div. N, tit. II, subtit. A, §§ 200–266, 134 Stat. 1182, 1950–64 [hereinafter Continued Assistance Act], extended PUA and PEUC programs into April 2021, started a new \$300 PUC benefit for weeks claimed in 2021 (until early April 2021), and created an additional supplemental benefit for self-employed individuals who only received regular

unemployment benefits because they had sufficient earnings in a benefits year to establish monetary eligibility for regular unemployment benefits.

- d. Before the April 2021 deadline, the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, extended all of these programs through September 6, 2021. So, the last week for which PUC, MEUC, PEUC, and PUA benefits could be claimed in Wisconsin was the week ending September 4, 2021.

NOTE: Because hearings over pandemic-related job losses are still taking place as of spring 2022, many if not all of these pandemic benefit programs will still be litigated for years to come.

NOTE: For additional information on how all of the pandemic unemployment relief programs operate and relevant dates (other than LWA), see the flowcharts and tables in the Department of Labor's UIPL No. 14-21 (Mar. 15, 2021), at I-6, II-1 to II-2.

2. PEUC Benefits

a. Eligibility for and Duration of Benefits: In General

PEUC benefits arise from a series of extensions of unemployment benefits for claimants who have exhausted their eligibility for regular unemployment benefits. Via the CARES Act, the Continued Assistance Act, and the American Rescue Plan Act, PEUC benefits are available for

- (1) A maximum of 13 weeks in 2020, and
- (2) A maximum of 40 weeks in 2021.

b. Combined-Wage (Interstate) Claims

- (1) Because eligibility for PEUC benefits only exists when claimants have exhausted their eligibility for regular unemployment benefits, a very common problem occurs for claimants who have worked in multiple states and who may then allegedly qualify for regular unemployment benefits in those other states. This issue arose in thousands of cases during the Great Recession, and this problem has only started to appear in cases during the pandemic.

NOTE: For those claimants receiving PUA benefits because they cannot establish benefit-year eligibility in Wisconsin, this problem will also occur for these PUA claimants who work across state boundaries.

This problem is occurring because Wisconsin is generally not processing combined-wage (also called interstate) claims for claimants who work across state boundaries. So the wages in the other state are not being incorporated in Wisconsin when determining monetary eligibility for claimants. Those unused wages in that other state potentially mean that claimants can establish monetary eligibility in that other state, and a benefit year in another state means no eligibility for PEUC benefits.

NOTE: Combined-wage (interstate) claims usually cannot be filed on online portals but require claimants to call specific phone numbers for special handling of their initial claims.

- (2) Claimants cannot look to unemployment law in the other state to establish their ineligibility in that other state. For instance, no state apparently will find a claimant eligible for unemployment benefits if the claimant has earnings in only one calendar quarter, no matter how high the earnings in that quarter are. But in *Woods*, UI Dec. Hearing No. 21602018MD (LIRC Jan. 21, 2022), <https://wisconsinui.files.wordpress.com/2022/04/woods-hrg21602018md.2022.01.21.pdf>, LIRC found a claimant potentially eligible for unemployment benefits in Illinois because she had earnings in that state in one quarter that had not been used for calculating her monetary eligibility in Wisconsin. So she had to repay the PEUC (and PUC) benefits she had received. The only way to resolve potential eligibility in another state is for the claimant to file an initial claim for regular unemployment benefits in that other state, have that initial claim denied, and then present that denied initial claim to an appeal tribunal.

Ideally, Wisconsin would pursue a combined-wage claim on behalf of claimants that combined their Wisconsin wages with the wages based in the other state. Or claimants would find the right phone number to call for a combined-wage claim in that other state. Whatever the situation, their eligibility in another state cannot be resolved until they file these initial claims and get denied for lacking benefit-year eligibility. The ensuing denial paperwork must be submitted to the DWD to reinstate PEUC eligibility and remove the alleged overpayment.

3. EB Eligibility

- a. Various federal laws affected how benefits are charged for the permanent EB program and gave states flexibility to modify certain provisions of their unemployment insurance laws. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 4102–4105, 134 Stat. 178, 192–95 (2020) (Emergency Unemployment Insurance Stabilization and Access Act of 2020); *see* I.R.C. § 3304 note.
- b. A claimant can only receive EB program benefits after exhausting all eligibility for regular unemployment benefits and PEUC benefits. In Wisconsin, eligibility for EB program benefits can only start the week ending May 23, 2020, and EB eligibility most recently ended after the week ending November 7, 2020. *See* DWD, *Federal Unemployment Programs Ended*, <https://dwd.wisconsin.gov/uiben/programs/#eb> (last visited May 17, 2022). During this period, a person could only receive a maximum of 13 weeks of EB program benefits. [Wis. Stat.](#) § 108.141(1)(c).

CAUTION: Because of delayed action by the DWD, EB eligibility was not determined to exist in Wisconsin until the early fall of 2020, just a month or two before Wisconsin concluded that EB eligibility ended in early November 2020. Accordingly, there is a great deal of confusion over EB eligibility and benefits. Many claimants were overpaid EB program benefits or not paid at all, and figuring out this issue means getting weekly payment information from the DWD and counting up weeks of regular unemployment benefits and then PEUC benefits and also determining if a new benefit year can be calculated.

4. PUC and LWA Supplemental Benefits

- a. To bring unemployment benefits to a level that could compare to an actual wage replacement for workers out of work because of the pandemic, Congress included a supplemental \$600 PUC payment for any week in which a claimant was eligible for any other kind of unemployment benefit. U.S. Dep't of Lab., UIPL No. 15-20 (Apr. 4, 2020). The first week in which these \$600 PUC benefits were available was the week ending April 4, 2020, and the last was the week ending July 25, 2020. If there was any overpayment owed by the claimant, the DWD still needed to pay one-half of each weekly PUC benefit to that claimant. U.S. Dep't of Lab., UIPL No. 15-20 Change 1 (May 9, 2020), at I-1 to I-2.
- b. LWA was awarded from Robert T. Stafford Disaster Relief, *see generally* 42 [U.S.C.](#) §§ 5121–5207. Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019 (Aug. 8, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-authorizing-needs-assistance-program-major-disaster-declarations-related-coronavirus-disease-2019/>. The LWA provided an additional \$300 per week for certain weeks of unemployment through the Federal Emergency Management Agency for workers eligible for at least \$100 in unemployment benefits. FEMA, *Supplemental Payments for Lost Wages*, <https://www.fema.gov/disasters/coronavirus/supplemental-payments-lost-wages> (last updated Mar. 17, 2021); DWD, *Lost Wages Assistance*, <https://dwd.wisconsin.gov/uiben/lwa/> (last visited May 17, 2022) (noting that federal unemployment benefit programs have ended). Offsets and recoupment against LWA benefits are not allowed, because they come from FEMA and are not unemployment benefits per se. U.S. Dep't of Lab., UIPL No. 27-20 Change 1 (Aug. 17, 2020), at I-5.
- c. With the Continued Assistance Act and then the American Rescue Plan Act, a \$300 supplemental PUC payment was started for the week ending January 2, 2021, and eventually extended to the week ending September 5, 2021. U.S. Dep't of Lab., UIPL No. 15-20 Change 3 (Jan. 5, 2021); U.S. Dep't of Lab., UIPL No. 15-20 Change 4 (Mar. 26, 2021), at 2. As with the previous PUC supplement, any unemployment debt recovery or offset is limited to one-half the weekly PUC payment. U.S. Dep't of Lab., UIPL No. 15-20 Change 1 (May 9, 2020), at I-1 to I-2.

PRACTICE TIP: Determinations that deny eligibility after benefits have been paid (and so allege an overpayment) do *not* include the specific, overpaid PUC or LWA benefit amounts. Because PUC and LWA supplemental benefits are as large as or substantially larger than the weekly benefit amounts normally paid out, claimants are sometimes not aware of what they owe until collection notices from the DWD arrive in their mail. The only way to assess the total amount owed is for claimants to get a benefit payment history from their portal that shows individual weeks for which certifications were filed and which of those weeks were paid benefits. For how claimants can get those benefit payment histories, see Victor Forberger, *New Portal 2.0 and How to Navigate It*, Wisconsin Unemployment (Mar. 31, 2021), <https://wisconsinui.wordpress.com/2021/03/31/new-portal-old-wine-in-a-new-bottle/>.

5. MEUC Supplemental Benefits

- a. Like PUC and LWA benefits, MEUC benefits are a supplemental benefit payment. But this supplemental payment only applies to a claimant receiving regular unemployment, PEUC, or EB benefits when that person also has substantial (\$5,000 or more) self-employment or gig income.

- b. This program was intended to address the situation in which a self-employed person is limited to regular unemployment benefits because the person has enough wage work to establish a benefit year for regular unemployment benefits. Under this program, claimants who have more than \$5,000 in self-employment income for the calendar year before their initial claim starts will be eligible for an additional \$100 per week on top of their regular unemployment (or PEUC or EB) benefit. *See* U.S. Dep’t of Lab., UIPL No. 15-20 Change 3 (Jan. 5, 2021) (setting forth eligibility and administrative criteria for MEUC benefits); U.S. Dep’t of Lab., UIPL 15-20 Change 4 (Mar. 26, 2021) (MEUC benefit eligibility extended by the American Rescue Plan Act).

6. PUA Benefits

a. Eligibility for and Duration of Benefits: In General

- (1) Congress passed the CARES Act on March 27, 2020, for the stated purpose of providing “emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic.” It included several federally funded “unemployment insurance” programs to provide relief including PUA. While PUA was originally set to expire in December 2020, it was extended by the Continued Assistance Act, Pub. L. No. 116-260, div. N, tit. II, subtit. A, 134 Stat. at 1950–64, to run through March 13, 2021, with a phaseout period reaching until April 5, 2021. On March 11, 2021, PUA benefits were extended even further to the week ending September 6, 2021, by the American Rescue Plan Act, Pub. L. No. 117-2, § 9011, 135 Stat. 4, 118. This same section of the American Rescue Plan Act also repealed the phaseout provision in the Continued Assistance Act and was replaced with a new “hold harmless” provision, allowing states to continue paying PUA or PEUC benefits to individuals who might otherwise not be eligible for those benefits in a new quarter because of monetary eligibility for a new benefit year. American Rescue Plan Act, Pub. L. No. 117-2, § 9011(c), 135 Stat. at 118; 15 U.S.C. § 9021 note; *see* U.S. Dep’t of Lab., UIPL No. 14-21 (Mar. 15, 2021), at 6.
- (2) While PUA benefits are a “benefit of last resort, they also are intended to fill gaps of coverage and eligibility for workers who cannot receive regular unemployment benefits because of their gig worker status or a lack of earnings to establish a benefit year or because a prior disqualification has rendered them ineligible for benefits despite a current, pandemic-related job loss. *See* Chairman Richard E. Neal, House Cmte. on Ways & Means, *Provisions Related to Unemployment Compensation in the Senate-Passed CARES Act*, https://davidscott.house.gov/uploadedfiles/uc_faq_cares_act.pdf (last visited May 17, 2022) (observing that PUA benefits follow the model of DUA for workers who have lost work because of the pandemic but are not otherwise eligible for regular unemployment benefits); Cong. Rsch. Serv., *Unemployment Insurance Provisions in the CARES Act (H.R. 748, as Amended)* (updated Apr. 9, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11475/> (describing PUA benefits as temporary unemployment benefits for those workers not eligible for regular unemployment benefits for pandemic-related job losses). So, an overly restrictive reading that seeks to exclude rather than to provide coverage is antithetical to PUA’s animating purpose.
- (3) Eligibility for PUA benefits is
 - (a) A maximum of 39 weeks in 2020, and

(b) A maximum of 40 weeks in 2021.

b. Qualifying Pandemic-Related Job Loss Reason

(1) In General

Because of varied implementation by the states, federal guidance has become more explicit and specific over time. Currently covered scenarios are listed in the Department of Labor's UIPL No. 16-20 Change 6 (Sept. 3, 2021), at Attachment I. Examples are available here for each specified reason, but they are illustrative and should not be considered as limitations on PUA coverage. LIRC has in some cases provided additional explanation or analysis for some of these reasons, and that addition will be noted.

(2) Individual with COVID Symptoms or Diagnosis

- (a) An individual diagnosed with COVID-19 or who is experiencing symptoms of COVID-19 and is seeking a medical diagnosis may qualify for PUA.
- (b) A positive test result for COVID-19 is not necessary. Only a diagnosis of COVID-19 or the existence of COVID-19 symptoms is needed to qualify.
- (c) Furthermore, an employer's acceptance of an employee's COVID-19 diagnosis or symptoms qualifies the employee for benefits. An employee's subjective belief of having COVID-19, without any additional support for such a diagnosis, does not qualify the employee for benefits. Therefore, rather than saying only that he or she has had COVID-19, the employee must assert that the employer agreed with the diagnosis or that the employee visited a physician or a hospital because of COVID-19.

(3) Household Member with COVID Symptoms or Diagnosis

When a member of the individual's household has been diagnosed with COVID-19, the employee might be eligible for PUA. In addition to the eligibility criteria discussed *supra*, the applicable focus is on the employee's household. The existence of COVID-19 in the employee's household prevents the employee from working, because that work could lead to spread of the virus.

(4) Caregiver

- (a) PUA might be available to an individual who provides care for a family member or a member of the individual's household who has been diagnosed with COVID-19. In this situation, the focus is on ongoing care that the person with COVID-19 needs from the employee and that consequently prevents the employee from working.
- (b) Additionally, PUA might be available to an employee with primary caregiving responsibility for a child or other person in the household who is unable to attend school or another facility that is closed as a direct result of the COVID-

19 public health emergency and the school or facility care is required for the employee to work.

- (c) While the lack of child care must be because of the pandemic, there is no requirement for the job loss per se to be because of the pandemic and there is no requirement that the child care be paid for the coverage to apply. *See Tribble*, UI Dec. Hearing No. 20009701MW (LIRC Oct. 28, 2021) (reversing prior denial of PUA eligibility because claimant could not accept a job offer—which is different from already having a job—and could not arrange for paid child care to accept the new job and begin working).

(5) Inability to Reach Place of Employment

- (a) PUA might be available to an individual who is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency. This provision only applies to employees in nonessential businesses that were closed as a result of various emergency orders or to employees directed to stay home because of health risks. See the discussion of emergency orders, *infra*. Because emergency orders were extremely limited in Wisconsin, this provision has relatively minimal application in Wisconsin. Nevertheless, for the weeks in which emergency orders were in effect, this provision should have universal application for claimants of PUA benefits.
- (b) An individual might also qualify for PUA if unable to reach the place of employment because the individual has been advised by a health-care provider to self-quarantine because of susceptibility concerns related to COVID-19. Similarly, PUA benefits might be available if an employer places an employee on a leave of absence based on a medical opinion regarding COVID-19 health risks.

(6) Job Offer Withdrawn or Delayed

An individual might qualify for PUA if the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency and if the individual accepted an offer of employment that was subsequently withdrawn or delayed because of the pandemic. Starting up the search for work again during the pandemic or having difficulty searching for a new job does not fit the requirements. *Bryan*, UI Dec. Hearing No. 20012086MD (LIRC Sept. 10, 2021) (finding that individual who last drove for Lyft in 2018 and did no driving at all in 2019 before attempting to restart driving in March 2020 had no labor-market connection at the time of his alleged pandemic-related job loss).

(7) Death of Head of Household

PUA might be available to an individual who has become the breadwinner or person providing the major financial support for a household because the prior head of the household died as a direct result of COVID-19.

NOTE: The references to “household” in these provisions are intended to encompass numerous living arrangements, and PUA eligibility is *not* limited to family members,

(8) Job Separation

PUA eligibility might apply when an individual quits a job as a direct result of COVID-19. For example, this provision could apply to an employee who suffered a job separation after testing positive for COVID-19 and being required to quarantine, and the employer completely stopped scheduling the employee for work.

(9) Place of Employment Closed

(a) If an individual’s place of employment is closed as a direct result of the COVID-19 public health emergency, then the individual might be eligible for PUA. Initially, the DWD denied PUA eligibility unless the employee demonstrated complete closure of the employer. So, for example, servers at restaurants whose dining rooms were closed but that still provided takeout were deemed not eligible for PUA benefits. The DWD later readjusted its criteria and started finding that a partial closure qualified under this provision.

(b) If there was no closure, however, the DWD refused to find any PUA eligibility, unlike most other states that allowed PUA benefits for any pandemic-related loss of work under this provision.

(10) Self-Employment

Self-employed individuals (including independent contractors and gig workers) who experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency, even absent a suspension of services, might be eligible for PUA benefits for any loss of work arising from the pandemic.

(11) Refusal to Work

(a) An individual could be eligible for PUA if continued unemployment benefits were denied because the individual refused to return to work or accept an offer of work at a worksite that was not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes standards related to mask-wearing, physical-distancing measures, and the provision of personal protective equipment consistent with public health guidelines.

(b) This provision applies to employees who refused to work with employers who were not following public safety health requirements to prevent the spread of COVID-19. In Wisconsin, this means failing to follow mask mandates in cities and counties that had them and in public transportation where a federal mask mandate is or was in place. See *infra* for the various emergency orders and rules.

(12) Service Provider to Educational Institution

- (a) If an individual provides services to an educational institution or educational service agency and the individual is unemployed or partially unemployed because of volatility in the work schedule that is directly caused by the COVID-19 public health emergency, then that individual might be eligible for benefits. This includes, but is not limited to, changes in schedules and partial closures.
- (b) This provision applies to school-year employees who generally are not eligible for regular unemployment because of reasonable assurance of reemployment. Wisconsin and a few other states denied PUA benefits to school employees unless those employees could assert complete shutdown of their school systems. All school-year employees who suffered some loss of work connected to the pandemic have argued that they should be eligible for PUA benefits under this provision.

NOTE: LIRC has denied PUA eligibility to school-year employees who lost summer work even though the summer work stemmed from a separate offer and was handled outside the regular school-year schedule. Meanwhile, the DWD has determined that several summer-school employees who lost summer work because of the pandemic were eligible for PUA benefits.

(13) Partial Loss of Work

- (a) An acceptable COVID-19-related reason for PUA eligibility may occur when an individual is an employee whose hours have been reduced or if the individual was laid off as a direct result of the COVID-19 public health emergency.
- (b) As noted *supra*, Wisconsin and a few other states initially limited PUA eligibility under to claimants whose employers had completely closed. This “partial loss of work” factor is intended to address the extremely narrow application of PUA eligibility and to allow benefits for any pandemic-related loss of work, similar to how regular unemployment covers any partial losses of work.

PRACTICE TIP: The Department of Labor’s UIPL No. 16-20 Change 5 (Feb. 26, 2021), at 10, also mandated that claimants be allowed to have multiple reasons for claiming PUA benefits for each weekly certification. Until spring 2021, Wisconsin only allowed claimants to list one pandemic-related reason for their job loss. Even as of spring 2022, litigation continues regarding claimants with multiple reasons that change over time for claiming PUA eligibility,

c. Self-Certification for Qualifying Pandemic-Related Job-Loss Reasons

(1) Federal Requirements

The U.S. Department of Labor Employment and Training Administration (ETA) and Office of the Solicitor (SOL) have clarified that the pandemic-related job loss identified by claimants does *not* need to be documented or proved. *See* Response to Office of Inspector General’s (OIG) Alert Memorandum The Pandemic Unemployment Assistance Program Needs Proactive Measures to Detect and Prevent Improper Payment and Fraud, Report Number: 19-20-002-03-315 (June 5, 2020), <https://www.oig.dol.gov/public/reports/oa/2020/19-20-002-03-315x.pdf>. The

memorandum explained that any additional requirements in regard to a claimant's self-certification conflict with an unambiguous statutory requirement in the CARES Act: "If the meaning of the statute is plain, there is no ambiguity to resolve and ETA has no authority to fill in the gaps." *Id.* at 5 (citations omitted).

"Self-certification" is defined by the Oxford Dictionary as "the practice of making an official declaration that something complies with regulatory standards or procedures without independent substantiating evidence." <https://www.lexico.com/en/definition/self-certification>. Accessed June 1, 2020; *see also Black's Law Dictionary* (11th ed. 2019) ("The signing of a form or note to verify that one has done something or to explain why one has not done something."). The plain meaning of Section 2102(a)(3)(A)(ii) [of the CARES Act] is clear—an individual is a "covered individual" and eligible for PUA benefits if they, among other things, provide self-certification of their eligibility. There is no statutory ambiguity as to how the requirement is fulfilled; thus, neither the States nor ETA have authority to interpret that language to include an additional requirement such as substantiating documentation of employment.

Id.

(2) LIRC Requirements

LIRC, however, has held that self-certification is not sufficient for PUA eligibility in light of the PUA documentation requirement (discussed below) and that there is no legal requirement to accept a claimant's self-certification as true or accurate.

States are required to take reasonable and customary precautions to deter and detect fraud and improper payments and have the authority to request supporting documentation for fraud and improper payment prevention at any point. So, although the PUA program relies on self-certification to verify that an individual is covered under the program, states have, and are encouraged to use, their authority to request supporting documentation about a given COVID-19 related reason or other fact when investigating the potential for improper payments. [U.S. Dep't of Lab.,] UIPL No. 16-20, Change 4 [(Jan. 8, 2021)], Attachment I, [at] 9. This is a separate documentation requirement than that created in the Continued Assistance Act for individuals to submit documentation to substantiate their employment or self-employment. *Id.*

Thus, self-certification is not always sufficient to obtain PUA. *Neither the department nor the commission is required to accept everything certified to or testified to by a claimant as true and accurate.* States play a fundamental role in ensuring the integrity of the unemployment insurance program and must actively work to provide benefits only to individuals who are entitled to such benefits. [U.S. Dep't of Lab.,] UIPL No. 16-20 [(Apr. 5, 2020)], [at] 2.

Schiffman, UI Dec. Hearing No. 21009472MD (LIRC Oct. 22, 2021), <https://wisconsinui.files.wordpress.com/2022/04/schiffman-21009472md.2021.10.22.pdf> (citations in footnotes added to text) (emphasis added).

COMMENT: While LIRC reversed the appeal tribunal and found Schiffman eligible for PUA benefits because her explanation of her job loss was more credible than her employer's, LIRC disregarded the June 5, 2020, federal memorandum about PUA

eligibility requirements. Indeed, Wisconsin and other states have attempted to justify adding requirements to PUA eligibility by asserting a need to stop claimant fraud even when such fraud has not been alleged.

d. Being Able and Available for Work

- (1) The CARES Act requires that claimants self-certify that they are “otherwise able to work and available for work within the meaning of applicable State law” for one or more of the allowable eligibility reasons). Pub. L. No. 116-136, § 2102(a)(3)(A)(ii)(I), 134 Stat. 281, 313 (2020). Thus, state law “able and available” requirements apply to PUA claimants, and, at any hearing regarding PUA benefits, the issue of a claimant’s able and available status may come up.

NOTE: The “notice” for this issue is the reference to the CARES Act in every hearing notice concerning PUA benefits.

- (2) At the PUA benefit hearings, the appeal tribunal asks whether claimants are able to work 32 or more hours in a week and whether they are available for 32 or more hours of work from any employer. If the claimant answers “no” to either question, PUA eligibility is denied.
- (3) As noted in the discussion of able and available in section [2.13](#), *supra*, Wisconsin law does *not* require a claimant to be able and available for 32 or more hours of work in a week. Rather, per [Wis. Admin. Code](#) § DWD 128.01(3) and (4), a claimant with a physical or mental limitation that restricts the work that can be done in any week is still able and available for unemployment purposes as long as that person is willing to work as many hours as he or she is capable of working.
- (4) On the other hand, if claimants declare that they are limiting the amount of work they can perform in any one week because of any other factor outside their specific physical or mental limitation, then those claimants are *not* able and available for work. *Madsen*, UI Dec. Hearing No. 20613147MD (LIRC Nov. 1, 2021) (concluding that claimant who limited her hours of work so as to maximize her SSDI benefits was not able and available for work for purposes of unemployment law).

PRACTICE TIP: At hearings, expect ALJs to challenge claimants over any financial factors that could potentially limit their work hours.

- (5) There are also specific exceptions for pandemic-related job loss in which the able and available requirement does *not* apply:
 - (a) An individual has a COVID-19 diagnosis or has the symptoms of COVID-19 and is seeking a medical diagnosis.
 - (b) A household member is diagnosed with COVID-19 or is providing care to a household member who has been diagnosed with COVID-19.
 - (c) A person is scheduled to start work but cannot start that work or reach that work as a direct result of the COVID-19 health emergency.

- (d) A person cannot reach a place of employment because of a quarantine imposed as a direct result of COVID-19 or because that person has been advised to self-quarantine.
 - (e) A person has primary caregiving responsibilities of another person and that other person cannot attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and that school or facility care is required for the individual to work.
 - (f) A person has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19.
- (6) When a claimant is unable and unavailable for work because of the reasons stated in the CARES Act, Pub. L. No. 116-136, § 2102(a)(e)(ii)(I), 134 Stat. at 313–14. the state’s “able and available” provisions are not applicable, and applying those provisions to these claimants is a violation of the express language of the CARES Act.
- e. Documentation Requirement for 2021 Weeks Claimed
- (1) Because of concerns about fraudulent PUA claims, the Continued Assistance Act added a documentation requirement for weeks claimed in 2021, i.e., beginning with the week ending January 2, 2021. Pub. L. No. 116-260, § 241, 134 Stat. at 1959–60. The Department of Labor’s UIPL No. 16-20 Change 4 (Jan. 8, 2021), at I-9 to I-12, states that claimants must provide documentation within 21 days after their application or the date the individual is directed to submit the documentation by the state agency, whichever is later. If an individual is delayed in providing this documentation, the Department of Labor directs the state agency to apply the applicable state law allowing late submission for “good cause.” *Id.*
 - (2) In *Koch*, UI Dec. Hearing No. 21603562MD (LIRC Jan. 28, 2022), <https://wisconsinui.files.wordpress.com/2022/04/koch-hrg21603562md-pua-documentation.pdf>, LIRC found that the DWD’s notice to claimants about the documentation requirement lacked the required “good cause” for a delay in providing the requested documentation. Accordingly, any overpayment notice about failing to provide this requested documentation should be appealed (if an appeal is still possible). The appeal tribunal can then reverse the determination and thereby give the claimant a second chance to provide the requested documentation. The original inadequate-documentation notice from the DWD provides “good cause” for claimants’ late response.
 - (3) The following can provide acceptable “proof” to establish PUA eligibility:
 - (a) For employment: paycheck stubs, earnings and leave statements showing the employer’s name and address, and W-2 forms.
 - (b) For self-employment: state or federal employer identification numbers, business licenses, tax returns, business receipts, and signed affidavits from persons verifying the individual’s self-employment.

- (c) For employment with organizations such as the Peace Corps, AmeriCorps, and educational or religious organizations: documentation provided by these organizations and signed affidavits from persons verifying the individual's attachment to such organizations.
 - (d) For the planned commencement of employment: letters offering employment and statements or affidavits by individuals (with name and contact information).
- (4) This additional documentation requirement does *not* apply to claimants who receive PUA benefits for weeks before December 27, 2020. U.S. Dep't of Lab., UIPL No. 16-20 Change 4 (Jan. 8, 2021), at I-4.

CAUTION: DWD's "notice" of this documentation requirement has been sporadic and uneven. Thus, many claimants have missed the notice completely or not understood it and have waited for follow-up clarification that will never arrive. In Wisconsin, the documentation requirement was eventually incorporated in a lengthy warning provided to claimants when they finished their initial claims for PUA benefits. Claimants who were still in the process of applying for PUA benefits could have easily overlooked the 21-day requirement and completely skipped the various categories. Furthermore, the notice directed claimants to a web page that presented only an overview of the PUA claim-filing process instead of providing claimants with live links to a documentation-specific section of the portal. As of October 26, 2021, the general web page spelled out only the following consequence for failure to submit the necessary documentation: "If you are unable to provide proof of your income, you will only be allowed the minimum PUA payment. Once you are able to provide your proof of earnings, your claim may be redetermined. If it results in a higher amount, adjusted payments will be issued." (The limited explanatory content from the PUA overview web page, <https://dwd.wisconsin.gov/uiben/pua/apply/>, has since been removed altogether.) Even careful readers often did not comprehend that failure to submit the requested documentation would lead to denial of PUA eligibility for weeks claimed in 2021.

NOTE: In 2020, and in contrast to the warning quoted above, Wisconsin refused to pay any PUA benefits until a weekly benefit rate for PUA benefits could be calculated.

- (5) Claimants who fail to provide the required documentation are being ordered to repay all PUA benefits received for their 2021 weekly certifications. This determination appears to be unappealable and unreviewable, unless a claimant has a basis for claiming that failure to provide this documentation was for reasons beyond the claimant's control. But see *Koch, supra*.
- f. Notice of PUA Eligibility and Backdating of PUA Eligibility
- (1) Technically, PUA initial claims are not backdated. PUA initial claims filed in 2020 can have an effective date that relates to the pandemic-related job loss at issue as early as February 2, 2020. Through the Continued Assistance Act and then expanded through the American Rescue Plan Act, new initial claims for PUA benefits filed after December 27, 2020, can have a start date as early as February 2, 2020, but will only be paid for weeks after December 6, 2020. U.S. Dep't of Lab., UIPL No. 16-20 Change 4 (Jan. 8, 2021), at I-18 to I-19.
 - (2) If an individual filed an initial claim for regular unemployment benefits on or before March 14, 2021, and is later determined not eligible for those regular unemployment

benefits, that person must have the option of filing an initial claim for PUA benefits that has the same date as the original regular unemployment benefits initial claim. U.S. Dep’t of Lab., UIPL No. 16-20 Change 4 (Jan. 8, 2021), at I-13 to I-14. A person who has filed a regular unemployment initial claim on or before December 27, 2020, and is later determined ineligible for those benefits must have the option of a PUA initial claim based on the same date of filing as the regular unemployment initial claim. *Id.* at I-19; U.S. Dep’t of Lab., UIPL No. 16-20 Change 6 (Sept. 3, 2021), at II-1 to II-2.

- (3) Any claimant denied eligibility for regular unemployment benefits, PEUC benefits, or EB program benefits for job losses between February 2, 2020, and September 6, 2021, should receive notice about potential eligibility for PUA benefits and have the option to file a PUA initial claim for PUA benefits. For the most part, initial determinations, appeal tribunal decisions, and even LIRC decisions do *not* include this notice, even though these decisions refer back to weeks in which PUA benefits are available. If such notice is included, claimants have 21 days from the date of the initial determination, appeal tribunal decision, or LIRC decision to file an initial claim for PUA benefits.
- (4) Because of the “new” PUA eligibility criteria in the Department of Labor’s UIPL No. 16-20 Change 5 (Feb. 25, 2021), at 11, states were obligated “to notify [individually] every individual who had previously filed a PUA claim at any time while the PUA program was in effect, and was denied for **any** week because they were not unemployed, partially unemployed, or unable or unavailable to work for one of the COVID-19 related reasons available at the time.” Previously, states had to notify individual claimants denied regular unemployment benefits, PEUC benefits, or EB program benefits about the possibility of applying for PUA benefits as a result of that denial. UIPL No. 16-20 Change 4 (Jan. 8, 2021), at I-29.

COMMENT: The consequences for a lack of individualized notice are unclear. Claimants who never received notice of potential PUA eligibility might only realize they have a viable PUA initial claim in 2022 or later, but how to address that issue is an open question.

7. Waivers of Overpayments for Equity and Good Conscience

- a. In early May 2021, the DWD announced that overpayments of any federally funded benefits—PEUC, PUA, EB, PUC, MEUC, and LWA—could be waived for equity and good conscience. *See* Victor Forberger, *Over-Payments and Waivers*, Wisconsin Unemployment (May 11, 2021), <https://wisconsinui.wordpress.com/2021/05/11/over-payments-and-waivers/>. This waiver standard consists of two parts:
 - (1) The claimant has *not* provided inaccurate or incomplete claim-filing information (fraudulent information is automatically concluded to be inaccurate) to the DWD, and
 - (2) Repayment of the amount due is contrary to equity and good conscience.
- b. There are three ways to establish equity and good conscience.
 - (1) Demonstrate that repayment would cause financial hardship to the claimant.

This test is by far the most common method and consists of setting forth the claimant's monthly household income and expenses to show whether repayment of the entire amount due is affordable. The test is not to determine a partial amount due or to come up with a repayment plan that works in light of the claimant's income and expenses. Rather, the issue is to determine whether the entire amount due can be repaid in light of the claimant's current income and expenses. Partial repayment, after all, defeats the whole purpose of economic stimulus, which unemployment benefits are designed to provide. A claimant belonging to a household that is at or just above poverty level for the corresponding household size should automatically receive a waiver for equity and good conscience.

- (2) Even if the claimant can afford to repay the benefits, show that forcing repayment would cause the claimant to relinquish a valuable right or to change a financial position for the worse.

For example, a claimant who used a lump-sum payment of PUC and PUA benefits to start a business could possibly afford to repay those benefits but those repayments would mean the likely closure of the new business. Likewise, paying off a debt before knowing about the overpayment is also relevant. Furthermore, repayment that would likely lead a claimant into poverty also satisfies this equity-and-good-conscience standard.

- (3) Demonstrate that recovery of the overpayment would be considered unconscionable under the circumstances. This standard is akin to the shocks-the-conscience standard.

c. SSDI Cases and Trade Adjustment Assistance (TAA) Cases

These have previously applied the equity-and-good-conscience standard (sometimes referred to in these cases as "extraordinary hardship"). For instance, in *DWD v. LIRC (Richards)*, No. 08CV568 (Wis. Cir. Ct. Dane Cnty. Feb. 25, 2009), <https://wisconsinui.files.wordpress.com/2022/04/richards-danecircuit-08cv568-equitygoodconscience.2009.02.25.pdf>. the court dealt with whether a repayment could constitute an extraordinary hardship (there was no allegation of inaccurate or incomplete information from the claimant) in light of the size of the repayment obligation (a very common issue with all pandemic-related overpayments). The DWD and an ALJ held that the claimant's subsequent income in a new job made a waiver of a \$22,683 overpayment impossible. LIRC, however, found that repayment would constitute an extraordinary financial hardship and allowed a waiver for equity and good conscience. Judge Sumi affirmed LIRC with her own reasoning:

"Equity and good conscience" can be measured not only by balancing income and expenditures, but also by the enormity of the repayment obligation. It is reasonable to allow the agency (or court) to consider the size of the debt in determining what constitutes an extraordinary financial hardship. It is reasonable to conclude that a \$22,683 debt not knowingly incurred by a wage earner presents a potentially crippling obligation for the employee's entire working life.

Rigid adherence to the administrative definition of "extraordinary financial hardship" would require that a claimant sink into a period of utter destitution before recoupment could be waived. This result would be plainly inconsistent with the statutory standard of "equity and good conscience." It would also defeat one of the congressional purposes underlying the Trade Act, "to provide adequate procedures to

safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firms, workers and communities to adjust to changes in international trade flows.” 19 [U.S.C.](#) § 2102(4).

Richards, slip op. at 9.

d. Cases Involving Relatively Small Amounts

Waiver for equity and good conscience is highly unlikely when the amounts to be recouped are relatively small. In several cases, claimants had been paid extra PUC benefits for several weeks because of DWD computer errors. *See Johansen*, UI Dec. Hearing No. 20011969MD (LIRC Mar. 22, 2021); *Marshall*, UI Dec. Hearing No. 20017315MD (LIRC Mar. 31, 2021); *Fisher*, UI Dec. Hearing No. 20014756MD (LIRC Mar. 31, 2021); *Rangel*, UI Dec. Hearing No. 20013136MW (LIRC Mar. 31, 2021). In these cases, LIRC generally found the overpayment amounts, ranging from \$180 to \$2,040, did not constitute crippling financial obligations. Only if the claimants were in a household living in poverty could such repayments be waived for equity and good conscience. That is, there needs to be evidence to demonstrate that, absent waiver, the claimant would lose or be unable to obtain minimal necessities of food, medicine, and shelter for a substantial period of time, and that hardship would endure for the foreseeable future.

e. Claims with Inaccurate or Incomplete Information and Confusion Caused by Compound Questions

- (1) Most repayment cases do not get past the first obstacle: inaccurate or incomplete information. Any confused claim-filing reporting by a claimant is taken by the DWD to be inaccurate or incomplete information that prevents the possibility of any waiver. There are cases in which claimants reported inaccurate or incomplete claim-filing information. *See, e.g., Bryan*, UI Dec. Hearing No. 20012086MD (LIRC Sept. 10, 2021) (finding that claimant who stopped working in 2018 to attend school full time had no pandemic-related job loss, and concluding that overpayment of PUA benefits was not waived for equity and good conscience because the overpayment resulted from incorrect information from the claimant). But there are scores more cases in which the claimants’ claim-filing mistakes are caused by confusing claim-filing processes and even mistaken advice from staffers and instructions on the claim-filing portal. In 2014 and 2015, LIRC repeatedly warned the DWD about the confusion created by compound questions on claimants’ weekly certifications. For example, in *Wallenkamp v. Arby’s Restaurants*, UI Dec. Hearing Nos. 13607281MW, 13607282MW (LIRC May 15, 2014) (footnotes omitted), *aff’d sub nom. DWD v. LIRC (Wallenkamp)*, No. 2015AP716, 2016 WL 380186 (Wis. Ct. App. Feb. 2, 2016) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), LIRC explained:

Contrary to the ALJ’s finding, Question No. 4 in its current incarnation is not simple and straightforward. While the department’s former “Did you work?” version may have been straightforward and not easily susceptible to misinterpretation, the department’s current version presents at least two distinct, alternative questions within one compound question. There are inherent dangers in inviting a “Yes” or “No” answer to a compound question, because it is often not possible to be certain to which part, or parts, a single response applies. This is especially true when a claimant files claims by telephone, where the last

question heard is not “Did you work?” When the answer to a compound question relates to the substantive issues and the ultimate outcome in a case, as it does here, the commission will not infer an intent on the part of the claimant to mislead or defraud the department because both the question and the answer can be misunderstood.

- (2) For PUA weekly certifications, compound questions continue to appear. Claimants filing self-employment weekly certifications for PUA benefits are initially only being asked about self-employment work (“During the week, did you work in your self-employment?”) before being asked a compound question (“During the week, did you work in employment or receive income from your self-employment?”). Immediately below this question is the direction that begins, “Answer ‘Yes’ if you received income from your self-employment.” So, there is no surprise now that there are hundreds, if not thousands, of self-employed PUA claimants who answered “No” to this question even though they were working in covered employment. They answered “No” despite their work in employment because of the confusing nature of this compound question that goes from covered employment to self-employment without a distinction.

NOTE: As in *Wallenkamp*, the DWD nearly always charges fraud against claimants who answer this compound question and other compound questions incorrectly. To see the questions being asked of claimants, go to Victor Forberger, *Claim-Filing Questions in Wisconsin*, Wisconsin Unemployment (Oct. 29, 2020), <https://wisconsinui.wordpress.com/2020/10/29/claim-filing-questions-in-wisconsin/>.

- (3) When the DWD concludes that a claimant did not provide inaccurate or incomplete claim-filing information, it will include a notice similar to the following on the initial determinations:

If you disagree with the decision, follow the instructions to file an appeal. If you agree with the decision, you may apply for a waiver of the overpayment and any overpayment of federal pandemic unemployment compensation or lost wages assistance associated with this determination after the appeal period has ended. You will receive a message in your portal with instructions on applying for the waiver. If you are unable to go online, call (414) 435-7069 or toll free (844) 910-3661 to have a waiver application mailed to you.

CAUTION: Claimants have 21 days from the date of this determination to request a waiver. Claimants cannot both appeal and request a waiver. They must choose one or the other option. If the DWD concludes that claimants have not provided inaccurate or incomplete information, they will receive a notice, on the portal, similar to the following for 21 days:

Wisconsin Unemployment Insurance

Department of Workforce Development

Message

Subject: Cares Act Overpayment Waiver Application Available

Sent: 2/15/2022 10:23:59 AM

Under the CARES Act P.L. 116-136, Continued Assistance Act (CAA) P.L. 116-260, and guidance from FEMA, claimants may be eligible for waiver of overpayments of Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), Federal Pandemic Unemployment Compensation (FPUC), Mixed Earners Unemployment Compensation (MEUC), and Lost Wages Assistance (LWA).

You have been identified as having an overpayment under one of the special programs above and can request a waiver of the overpayment.

The conditions for waiving the recovery of the overpayment are:

1. The payment was made without fault on the part of the individual, and
2. Requiring such repayment would be contrary to equity and good conscience.

[Start Waiver Application](#)

- (4) Claimants who miss the 21-day waiver application must show why a late waiver request is for reasons beyond their control. *See supra* § 2.17 (discussing late appeals). Claimants who are not filing weekly certifications and so miss the notice on the portal may have a late waiver request excused. *See Legacy v. Leias Renu*, UI Dec. Hearing No. 12001056MD (LIRC June 26, 2012) (finding that claimant had stopped filing claims and so did not expect any notices from DWD, and concluding that her failure to file timely request for hearing was beyond her control). Claimants who are confused by this notice and do not act promptly might not have any recourse.

PRACTICE TIP: At present, there is no apparent way to contest the DWD's conclusion that a claimant is at fault for inaccurate or incomplete information without appealing all initial determinations that deny eligibility for that claim-filing mistake and then contesting claimant fault at the hearing.

B. State Response [§ 2.86]

NOTE: The Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 4102–4105, 134 Stat. 178, 192–95 (2020) (Emergency Unemployment Insurance Stabilization and Access Act of 2020); *see* I.R.C. § 3304 note, gave states flexibility in how to administer state eligibility requirements for regular unemployment benefits (such as waiving work-search requirements completely and other requirements and disqualification standards during the pandemic).

1. Initial Responses

- a. On March 12, 2020, Governor Tony Evers declared a public health emergency. Exec. Order No. 72 (Wis. Off. of the Governor) (Mar. 12, 2020), https://docs.legis.wisconsin.gov/code/executive_orders/2019_tony_evers/2020-72.pdf. On March 18, 2020, Governor Evers issued an emergency order about unemployment insurance, directing the DWD to consider a claimant available for suitable work during a public health emergency in certain circumstances and affecting work availability, absences from work, and work searches during a public health emergency (i.e., work

searches were waived). Emergency Order No. 7 (Wis. Off. of the Governor) (Mar. 18, 2020), https://docs.legis.wisconsin.gov/misc/emergency_orders/2020/phe_1/phe_2020_emergency_order_07.pdf.

- b. Although Governor Evers declared subsequent public health emergencies, the Wisconsin Supreme Court determined that the later orders were unlawfully issued. *See Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231. By then, emergency rules and other orders were in place, and so the *Fabick* decision has limited application in unemployment matters.
- c. Emergency Order No. 12 (Wis. Dep’t of Health Servs.) (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>, in effect until April 24, 2020, was the state’s first safer-at-home order, which closed numerous businesses, directed how other businesses could remain open, and directed that residents and workers stay at home when possible.
- d. Emergency Order No. 28 (Wis. Dep’t of Health Servs.) (Apr. 16, 2020), <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>, in effect until struck down in relevant part in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, was the state’s second safer-at-home order. Chief Justice Roggensack wrote the majority opinion, issued on May 13, 2020, but also wrote a separate concurrence, in which she added that the court’s “declaration of rights [was] effective immediately, [but she] would stay future actions to enforce [the] decision until May 20, 2020.”

2. Subsequent Responses

- a. In response to the Emergency Order No. 7, the DWD issued emergency rules affecting Wis. Admin Code chs. DWD 127 and DWD 128 regarding work searches and work availability. These include DWD Emergency Rule 2006 (May 9, 2020) (expired Feb. 2, 2021), https://docs.legis.wisconsin.gov/code/emergency_rules/all/emr2006, and DWD Emergency Rule 2106 (Feb. 2, 2021) (suspended May 19, 2021), https://docs.legis.wisconsin.gov/code/emergency_rules/all/emr2106, both of which amended state “able and available” law and requirements in light of the pandemic.
- b. Also relevant is the governor’s Executive Order No. 94 (Wis. Off. Of the Governor) (Nov. 10, 2020), <https://evers.wi.gov/Documents/COVID19/EO094-COVIDRecommendations.pdf>, which recommended that vulnerable individuals should avoid COVID-19 health hazards and continue to stay home.
- c. An excellent LIRC decision describing in detail the interplay of these emergency orders, executive orders, emergency rules, and court decisions is *Lewis v. Skogens Foodliner Inc.*, UI Dec. Hearing 20012206MD (LIRC Mar. 26, 2021). In this decision, LIRC found that the employee, a high-risk individual who was not subject to a clear instruction from an employer to return to work, remained able and available for work and thus was eligible for unemployment benefits, despite her decision to stay away from her job, through the various emergency orders and rules that had been issued.

NOTE: Mask mandates and other emergency orders specific to counties and municipalities require research into those specific orders from the applicable local health department. To start that research, see, e.g., League of Wis. Muns., *COVID-19 Coronavirus Resources, Legal Information*, <https://lwm-info.org/1658/Legal-Information> (last visited May 17, 2022).

3. End of State’s Responses

On May 19, 2021, Wisconsin’s Joint Committee for Review of Administrative Rules met and voted to immediately suspend the waiver of job-search requirements and pandemic-related “able and available” provisions contained in DWD Emergency Rule 2106, originally scheduled to expire on July 10, 2021. Accordingly, the COVID-19 “able and available” measures were eliminated, and job-search requirements were restored starting on May 23, 2021. All weekly certifications for the week ending May 29, 2021, and later had to include four job searches per week. For more information, see Victor Forberger, *Job Searches Are Back*, Wisconsin Unemployment (May 19, 2021), <https://wisconsinui.wordpress.com/2021/05/19/job-searches-are-back/>. As of May 23, 2021, there no longer was any allowance for COVID-19 in unemployment law for those individuals claiming regular unemployment benefits or PEUC benefits. If any of the reasons for PUA eligibility apply, however, the claimant should have notice and opportunity to apply for PUA benefits.

Chapter 3

Worker’s Compensation

Gary S. Stanislowski

Eric W. Lengell

Zilske Law Firm S.C.

Brookfield

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 232; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2022, No. 795; and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 24,846 (Apr. 26, 2022).

I. INTRODUCTION [§ 3.87]

A. In General [§ 3.88]

1. Wisconsin’s Worker’s Compensation Act ([Wis. Stat.](#) ch. 102 or the Act) provides an administrative system to transfer wage-replacement and medical-expense benefits to workers injured on the job by accident or occupational disease.
2. Benefits under the Act are employee’s exclusive remedy against
 - a. Employer. [Wis. Stat.](#) § 102.03(2).
 - b. Insurer. *Id.*

- c. Coemployees (except for assaults, some motor vehicle accidents, and some local-government employees). *Id.*; *Keller v. Kraft*, 2003 WI App 212, 267 Wis. 2d 444.
 - d. Employer's medical staff. *Jenkins v. Sabourin*, 104 Wis. 2d 309 (1981).
 - e. Named safety advisory organizations. [Wis. Stat.](#) § 102.03(3).
 - f. An employer who accepts services from a temporary help agency. [Wis. Stat.](#) § 102.29(6). *Estate of Rivera v. West Bend Mutual Insurance Co.*, 2018 WI App 14, 380 Wis. 2d 138, held that a temporary employee was not barred from bringing tort claims against temporary employer when the employee does not make a claim for compensation under the Act. [Wis. Stat.](#) § 102.29 later was amended, effective March 1, 2018, to make clear that if the employee has the right to make a claim for compensation, the exclusive remedy applies. The employee does not actually have to make a claim for compensation.
 - g. An employer who accepts services from a leased or loaned employee. [Wis. Stat.](#) § 102.29(6m)–(7).
 - h. An employer who provides work training or work experience to certain students. [Wis. Stat.](#) § 102.29(8).
 - i. An employer who provides employment or training to participants in certain government programs. [Wis. Stat.](#) § 102.29(8m)–(9).
 - j. A health-care facility that accepts the services of certain practitioners during a state of emergency. [Wis. Stat.](#) § 102.29(10).
 - k. A county in which a security officer of the Wisconsin Department of Military Affairs is conducting routine external security checks. [Wis. Stat.](#) § 102.29(11).
 - l. A person who accepts services from certain long-term care workers. [Wis. Stat.](#) § 102.29(12).
- 3. Employer's medical examiner is provided and paid for by the employer or insurer. [Wis. Stat.](#) § 102.13(1)(a).
 - 4. Employers must buy insurance for liability under the Act or qualify as self-insured. [Wis. Stat.](#) § 102.28(2).
 - 5. The system is administered by the Department of Workforce Development (DWD or the department) and the Division of Hearings and Appeals (division) in the Department of Administration (DOA). [Wis. Stat.](#) § 102.14(1). In 2016, the division assumed numerous powers that previously were granted to the DWD or its Worker's Compensation Division (W.C. Division), and several administrative law judges (ALJs) moved from the DWD to the DOA to oversee litigation of worker's compensation matters.
 - a. DWD's main office is located at 201 E. Washington Ave., P.O. Box 7901, Madison, WI 53707, (608) 266-3131; satellite offices are located at 819 N. 6th St., Milwaukee, WI 53203, (414) 224-4381, and 54 Park Place, Appleton, WI 54914, (920) 832-5451.

- b. Since April 16, 2018, all applications for hearing and filings in *litigated* cases should be filed by fax ((608) 260-3053) or uploaded to the WC Litigated Case Portal. Letter from Steven Peters, Div. Adm'r, DWD, to Attorneys Representing Parties in Worker's Compensation Disputes (July 11, 2019), <https://dwd.wisconsin.gov/wc/letters/insurance/pdf/522.pdf>. In addition, to comply with the Act and Administrative Code, certain filings must be sent to the division, Office of Worker's Compensation Hearings, 4822 Madison Yards Way, 5th Floor, Madison, WI 53705-9100. *See, e.g., Wis. Stat.* § 102.17(1)(d)3. (expert reports and medical records), (7) (notification of vocational expert), (8) (itemized statement of medical and other incidental expenses). A compromise should be filed with the department if no application for hearing is filed or if an application has been filed but is not ready to be scheduled for a hearing. *Wis. Stat.* § 102.16(1)(b). A compromise should be filed with the division if an application has been filed and is ready to be scheduled for a hearing. *Wis. Stat.* § 102.16(1)(c). According to a Memorandum of Understanding between the DWD and the DOA entered on November 11, 2021, the W.C. Division retains jurisdiction over a case, including review of compromise agreements, until 120 days after the answer is filed or a certification of readiness is verified, whichever is earlier. Thereafter, the division has jurisdiction over the case until no later than 21 days after the mailing of the findings and order resolving a case. *See* Memorandum from Steven Peters, Div. Adm'r, DWD, to Worker's Compensation Advisory Council, *Memorandum of Understanding between DWD Worker's Compensation Division and DOA Division of Hearings & Appeals* (Nov. 11, 2021), <https://publicmeetings.wi.gov/download-attachment/cc8ef361-4be3-4803-b1c9-0463f975a84b>.
- c. The division is conducting an increasing number of hearings by videoconference. Parties may request a video hearing in appropriate cases.
- d. According to *Wis. Stat.* § 102.18(2), staff includes
- (1) ALJs to conduct prehearings and hearings,
 - (2) Paralegals to answer public inquiries, and
 - (3) Auditors to check accuracy of reports of payment filed by insurers.

B. Other Resources [§ 3.89]

1. W.C. Division's publication of the Act, Administrative Code, and forms available from State Document Sales, 800-362-7253, and on the W.C. Division's website at <https://dwd.wisconsin.gov/wc> (last visited May 24, 2022).
2. John D. Neal & Joseph Danas, Jr., *Worker's Compensation Handbook* (State Bar of Wis. 9th ed. 2019 & Supp.) [hereinafter *W.C. Handbook*]. Summary of statutory law, case law, and procedure.
3. Arthur Larson, et al., *Larson's Workers' Compensation Law* (1997 & Supp. 2019) (multivolume treatise on compensation law in all states, often cited as authority by Wisconsin appellate courts).
4. Forms, posters, fact sheets, and other information available free from W.C. Division's website, <https://dwd.wisconsin.gov/wc> (last visited May 24, 2022).

II. UNDISPUTED CLAIMS [§ 3.90]

A. Employer or Insurer Duties [§ 3.91]

1. Insured employers must notify insurer of compensable injury within seven days if disability exists beyond third day after employee leaves work as result of accident or disease, or if the insurer has primary liability for unpaid medical treatment. [Wis. Admin. Code](#) § DWD 80.02(1).
2. Self-insured employers and insurers
 - a. Must file first report of injury with the department on form WKC-12 within 14 days after an accident or beginning of disability from occupational disease, or if the employer does not provide notice within that period, within 7 days after receiving notice of injury from any source, [Wis. Admin. Code](#) § DWD 80.02(2)(a).
 - b. Must file supplementary report on form WKC-13 with the department
 - (1) Within 30 days after accident, [Wis. Admin. Code](#) § DWD 80.02(2)(b);
 - (2) Within 30 days, with copy to employee, after certain other events occur (benefits change from temporary to permanent disability, temporary disability benefits are reinstated, temporary partial disability is paid, or final payment of compensation is made), [Wis. Admin. Code](#) § DWD 80.02(2)(e); or

NOTE: If there are more than three weeks of temporary disability or any permanent disability or if the injured employee has undergone surgery to treat the injury (other than surgery to correct a hernia) or if an employee sustains an eye injury requiring treatment, outside the employer's premises, on three or more occasions, then (when the final payment of compensation is made) a final medical report must be filed with the WKC-13. If no report is available, an explanation must be included with the WKC-13. The department cannot require a final report when the employee's claim is denied and the denial is not contested. [Wis. Stat.](#) § 102.13(2)(c).
 - (3) When submitting a stipulation or compromise, and at time of hearing, [Wis. Admin. Code](#) § DWD 80.02(2)(f).
 - c. Must submit wage information on form WKC-13-A, if applicable. [Wis. Admin. Code](#) § DWD 80.02(2)(c).
 - d. Must submit signed statement from employee, if applicable, that availability is restricted to part-time employment. [Wis. Admin. Code](#) § DWD 80.02(2)(d).
 - e. Must submit written notice to the department and employee within seven days after
 - (1) Payments are stopped for any reason, [Wis. Admin. Code](#) § DWD 80.02(2)(g)1.;
 - (2) Decision is made to deny liability for payment of compensation, [Wis. Admin. Code](#) § DWD 80.02(2)(g)2.; or

- (3) Amputation will require artificial member or appliance, [Wis. Admin. Code](#) § DWD 80.02(2)(g)3.
- f. Must submit final receipt to the department within 30 days after final payment to employee, if increased compensation had to be paid. [Wis. Admin. Code](#) § DWD 80.02(2)(i).
- g. Must submit written notice to the department and employee within 30 days if employee fails to return to a treating practitioner for final examination. [Wis. Admin. Code](#) § DWD 80.02(2)(j).

NOTE: Upon written request, the department may authorize electronic or other alternate means of reporting. [Wis. Admin. Code](#) § DWD 80.02(3m).

B. Necessity of Attorney Representation [§ 3.92]

- 1. Attorney representation is premature if
 - a. Claim is under investigation but not yet denied, or
 - b. Claim is not yet *ripe*.

EXAMPLE: A claim is not ripe if a permanent disability occurs while temporary disability benefits are still being paid or before the insurer has the final medical report on which the permanent disability will be conceded.

- 2. Attorney representation is not premature if
 - a. Claim is denied by insurer,
 - b. Claim needs development before submitting to insurer (most occupational disease claims), or
 - c. Claim would not be paid without affirmative effort by or for employee
 - (1) Disfigurement, or
 - (2) Loss of earning capacity.

III. ISSUES THAT MAY BE DISPUTED [§ 3.93]

A. Generally [§ 3.94]

Following is an abbreviated summary of substantive issues from statutory and case law; for a more comprehensive summary, see [W.C. Handbook](#), *supra* § 3.3.

B. Liability [§ 3.95]

See [W.C. Handbook](#), *supra* § 3.3, ch. 2.

1. Employer subject to the Act.
 - a. Employer who has three or more employees, [Wis. Stat.](#) § 102.04(1)(b)1.;
 - b. Employer who has paid *total* wages of \$500 in any quarter, [Wis. Stat.](#) § 102.04(1)(b)2.; or
 - c. Any *employer* who has elected coverage by purchasing insurance, [Wis. Stat.](#) § 102.05(2); *Lloyd Frank Logging v. Healy*, 2007 WI App 249, 306 Wis. 2d 385.
 - d. Exceptions
 - (1) Certain farmers. [Wis. Stat.](#) § 102.04(1)(b)3., (c).
 - (2) Certain corporate officers can elect not to be subject to the Act. [Wis. Stat.](#) § 102.076.
2. Employee subject to the Act.
 - a. A person in service of another under express or implied contract of hire
 - (1) Including helpers of employees
 - (2) Excluding domestic servants. [Wis. Stat.](#) § 102.07(4).
 - b. Independent contractors, unless nine conditions are met. [Wis. Stat.](#) § 102.07(8).
 - c. Public servants
 - (1) Government workers and officials. [Wis. Stat.](#) § 102.07(1).
 - (2) Peace officers. [Wis. Stat.](#) § 102.07(2).
 - (3) Members of volunteer fire departments, rescue squads, and diving teams. [Wis. Stat.](#) § 102.07(7).
 - (4) Emergency management personnel. [Wis. Stat.](#) § 102.07(7m).
 - (5) Members of the National Guard and state defense force. [Wis. Stat.](#) § 102.07(9).
 - d. Participants in certain programs
 - (1) School work training, work experience, and work study. [Wis. Stat.](#) § 102.07(12).
 - (2) Juvenile community service. [Wis. Stat.](#) § 102.07(13).
 - (3) Adult community service. [Wis. Stat.](#) § 102.07(14).
 - (4) Inmate work release and transitional employment. [Wis. Stat.](#) § 102.07(16).
 - (5) Prisoner work camps. [Wis. Stat.](#) § 102.07(17).

- (6) Wisconsin Works trial employment. [Wis. Stat.](#) § 102.07(17m).
 - (7) Wisconsin Works community service and transitional placement jobs. [Wis. Stat.](#) § 102.07(18).
 - (8) Long-term home and community care. [Wis. Stat.](#) § 102.07(20).
- e. Exceptions
- (1) Certain members of religious sects. [Wis. Stat.](#) § 102.07(4m), (5)(d).
 - (2) Certain volunteers for nonprofit organizations. [Wis. Stat.](#) § 102.07(11m).
 - (3) Certain state employees on leave to provide service to the American Red Cross. [Wis. Stat.](#) § 102.07(17g).
3. Employee must sustain *injury*.
- a. By accident or occupational disease. [Wis. Stat.](#) §§ 102.03(1)(a), 102.01(2)(c).
- NOTE: May include series of minor accidental injuries. *Shelby Mut. Ins. Co. v. DILHR*, 109 Wis. 2d 655 (Ct. App. 1982).
- b. Mental harm resulting from a physical injury is compensable. *Graef v. Continental Indem. Co.*, 2021 WI 45, ¶ 19, 397 Wis. 2d 75; *Johnson v. Industrial Comm'n*, 5 Wis. 2d 584 (1958).
 - c. Generally, mental harm resulting from nontraumatic stress is not covered unless the stress is unusual. *Swiss Colony, Inc. v. DILHR*, 72 Wis. 2d 46 (1976); *School Dist. No. 1 v. DILHR*, 62 Wis. 2d 370 (1974).
- (1) Effective April 29, 2021, an exception to this rule applies to law enforcement officers and fire fighters. [Wis. Stat.](#) § 102.17(9). In the case of a mental injury that is not accompanied by a physical injury and that results in a diagnosis of posttraumatic stress disorder (PTSD), a law enforcement officer or fire fighter does not need to show that the diagnosis is based on unusual stress. *Id.* PTSD in a law enforcement officer or fire fighter is compensable when (1) the diagnosis is made by a licensed psychiatrist or psychologist, and (2) the other conditions of liability under [Wis. Stat.](#) § 102.03(1) are proved by a preponderance of the evidence. [Wis. Stat.](#) § 102.17(9)(b).
 - (a) The PTSD cannot be the result of good-faith actions by the employer involving discipline, work evaluation, job transfer, layoff, demotion, or termination. [Wis. Stat.](#) § 102.17(9)(b)2.
 - (b) For PTSD that is not based on unusual stress, no individual may receive compensation more than 3 times in a lifetime. [Wis. Stat.](#) § 102.17(9)(c).

- (c) The period of disability and treatment may not exceed 32 weeks after the injury is first reported. [Wis. Stat.](#) §§ 102.42(1p), 102.44(7).
 - (2) Nontraumatic mental injuries that precipitate, aggravate, or accelerate beyond normal progression a preexisting physical condition need not meet the *unusual stress* test. *United Parcel Serv., Inc. v. Lust*, 208 Wis. 2d 306 (Ct. App. 1997).
 - d. For the period from March 12, 2020, through June 10, 2020, a first responder exposed to person with a confirmed case of COVID-19 in the course of employment was presumed to have sustained a COVID-19-related injury caused by the employment. [Wis. Stat.](#) § 102.03(6) (defining *first responder* as “an employee of or volunteer for an employer that provides fire fighting, law enforcement, or medical treatment of COVID-19, and who has regular, direct contact with, or is regularly in close proximity to, patients or other members of the public requiring emergency services, within the scope of the individual’s work for the employer”). Evidence that injury was caused by exposure to COVID-19 outside first responder’s work for the employer could rebut the presumption. [Wis. Stat.](#) § 102.03(6)(d), (e).
- 4. Injuries occurring outside the state are subject to a special test for jurisdiction. [Wis. Stat.](#) § 102.03(5).
 - 5. Employee must be in course of employment, which generally refers to time and space limits of employment. [Wis. Stat.](#) § 102.03(1)(c)1.
 - 6. Special rules govern course of employment.
 - a. *Personal comfort* doctrine (generally applying to breaks—coffee, lunch, etc.—on employer’s premises). *Weiss v. City of Milwaukee*, 208 Wis. 2d 95 (1997); *Marmolejo v. DILHR*, 92 Wis. 2d 674 (1979).

NOTE: The application of personal comfort doctrine and [Wis. Stat.](#) § 102.03 to established facts is a question of law. *Fry v. LIRC (In re Est. of Fry)*, 2000 WI App 239, 239 Wis. 2d 574.
 - b. Act in violation of employer directive. *Grant Cnty. Serv. Bureau v. Industrial Comm’n*, 25 Wis. 2d 579 (1964).
 - c. Private errands. *Continental Cas. Co. v. Industrial Comm’n*, 28 Wis. 2d 89 (1965); *Begel v. LIRC*, 2001 WI App 134, 246 Wis. 2d 345.
 - d. Momentary deviation. *Maahs v. Industrial Comm’n*, 25 Wis. 2d 240 (1964).
 - e. Horseplay. *Nigbor v. DILHR*, 120 Wis. 2d 375 (1984); *E.C. Styberg Eng’g Co. v. LIRC*, 2005 WI App 20, 278 Wis. 2d 540; *Bruns Volkswagen, Inc. v. DILHR*, 110 Wis. 2d 319 (Ct. App. 1982).
 - f. Fights. *Vollmer v. Industrial Comm’n*, 254 Wis. 162 (1948).
 - g. Intoxication. *Gimbel Bros. v. Industrial Comm’n*, 229 Wis. 296 (1938).

- h. Employer premises. [Wis. Stat.](#) § 102.03(1)(c)2.; *Halama v. DILHR*, 48 Wis. 2d 328 (1970).
 - i. Danger spilling off premises (when the hazard of employment crosses boundary line of employer's premises). [Wis. Stat.](#) § 102.03(1)(c)2.; *Frisbie v. DILHR*, 45 Wis. 2d 80 (1969).
 - j. Employer's parking lot. [Wis. Stat.](#) § 102.03(1)(c)2.; *American Motors Corp. v. Industrial Comm'n*, 18 Wis. 2d 246 (1962).
 - k. Recreational function off premises. *Schwab v. DILHR*, 40 Wis. 2d 686 (1968); *Continental Cas. Co. v. Industrial Comm'n*, 26 Wis. 2d 470 (1965).
 - l. Wellness program, event, or activity. [Wis. Stat.](#) § 102.03(1)(c)3. *But see City of Kenosha v. LIRC*, 2011 WI App 51, 332 Wis. 2d 448; *see also City of Appleton Police Dep't v. LIRC*, 2012 WI App 50, 340 Wis. 2d 720.
 - m. Work at home. *Black River Dairy Prods., Inc. v. DILHR*, 58 Wis. 2d 537 (1973).
 - n. Commuting or carpooling. [Wis. Stat.](#) § 102.03(1)(c)3.; *Krause v. Western Cas. & Sur. Co.*, 3 Wis. 2d 61 (1958); *Doering v. LIRC*, 187 Wis. 2d 472 (Ct. App. 1994).
 - o. Special or overtime trip. *Horvath v. Industrial Comm'n*, 26 Wis. 2d 253 (1965).
 - p. Required travel. [Wis. Stat.](#) § 102.03(1)(f).
 - q. Rescue situations. *Cherry v. Industrial Comm'n*, 246 Wis. 2d 279 (1944).
 - r. Daily commute to established worksite. *McRae v. Porta Painting, Inc.*, 2009 WI App 89, 320 Wis. 2d 178.
7. Injury must arise out of employment. [Wis. Stat.](#) § 102.03(1)(e).
- a. Generally
 - (1) *Arising out of* means injury is caused by a hazard of employment.
 - (2) Separate requirement from *course of employment*.

EXAMPLE: A heart attack that occurs while an employee is sitting at the employee's desk might or might not arise out of employment (medical question) even though the employee is in course employment.
 - b. Positional risk doctrine. *Allied Mfg., Inc. v. DILHR*, 45 Wis. 2d 563 (1970).
- NOTE: If the obligations or circumstances of employment placed the employee in the place where the employee was injured because of a force not solely personal to the employee while the employee was in the course of employment, the situation meets the *arises-out-of* test.

- c. Idiopathic fall: Fall caused by solely personal force does not arise out of employment. *Briggs & Stratton Corp. v. DILHR*, 43 Wis. 2d 398 (1969).
 - d. Unexplained fall does not arise out of employment. *Kraynick v. Industrial Comm'n*, 34 Wis. 2d 107 (1967).
 - e. Intentionally self-inflicted injuries do not arise out of employment. [Wis. Stat.](#) § 102.03(1)(d); *Pick 'N Save Roundy's v. LIRC*, 2010 WI App 130, 329 Wis. 2d 674.
 - f. *As is* rule: Predisposition to injury (preexisting condition) does not defeat claim as long as injury aggravates condition; employee is taken “as he or she comes to the gate.” *Lewellyn v. Industrial Comm'n*, 38 Wis. 2d 43 (1968).
 - g. Subsequent non-work-related injury. If work-related injury plays “any part” in subsequent non-work-related injury, it is a substantial factor, and consequences of second injury are compensable. *Lange v. LIRC*, 215 Wis. 2d 561 (Ct. App. 1997).
 - h. Effects of treatment. 3. [Wis. Stat.](#) § 102.42(1m); *Flug v. LIRC*, 2017 WI 72, 376 Wis. 2d 571; *Jenkins v. Sabourin*, 104 Wis. 2d 309 (1981); *Spencer v. DILHR*, 55 Wis. 2d 525 (1972); *City of Wauwatosa v. LIRC*, 110 Wis. 2d 298 (Ct. App. 1982).
 - i. Hernia: Special standards apart from medical opinion may govern compensability of hernia claims. *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634 (1978).
8. Date of injury. [Wis. Stat.](#) § 102.01(2)(g).
- a. If injury is accidental, date of accident.
 - b. If injury is by occupational disease, date of injury is
 - (1) Date of disability, *Virginia Sur. Co. v. LIRC*, 2002 WI App 277, 258 Wis. 2d 665; or
 - (2) Last day of work for last employer whose employment caused disability, *White v. LIRC*, 2000 WI App 244, 239 Wis. 2d 505.
9. Limitation periods
- a. Thirty-day notice of injury to employer. [Wis. Stat.](#) § 102.12.
 - (1) Notice period begins date employee knows nature of disability (not injury) and relation to employment.
 - (2) Employer must show that it was misled by lack of notice.
 - (3) Defense of lack of notice virtually never raised.
 - b. Two years to file application for hearing if claim disputed. [Wis. Stat.](#) § 102.12.
 - (1) Runs from date employee knew nature of disability and relationship to employment.

- (2) Does not apply if any compensation was paid.
 - (3) Does not apply if employer knew or should have known of injury.
 - (4) Seldom raised as defense.
- c. Statutes of limitation. See [Wis. Stat.](#) §§ 102.12, 102.17(4).
- (1) Run from date of last payment of compensation (not medical expense) or death. *International Paper Co. v. LIRC*, 2001 WI App 248, 248 Wis. 2d 348.
 - (2) Are suspended once application for hearing is filed.
 - (3) Duration of statute (originally six years) has been amended several times; changes apply to injuries after effective dates:
 - (a) Lung disease and toxic substance, extended to 12 years, effective January 1, 1974.
 - (b) All accidents and remaining diseases, extended to 10 years, effective January 1, 1978.
 - (c) All injuries extended to 12 years, effective May 13, 1980.
 - (d) Effective April 1, 2008, special limits may apply to occupational deafness. [Wis. Stat.](#) § 102.555(12)(b).
 - (e) Effective March 2, 2016, claims for traumatic injuries are generally subject to a six-year limitation period. [Wis. Stat.](#) § 102.17(4).
 - (i) There is no statute of limitation for traumatic injuries involving the loss or total impairment of a hand or any part of the rest of the arm proximal to the hand, the loss or total impairment of a foot or any part of the rest of the leg proximal to the foot, any loss of vision, any permanent brain injury, an artificial spinal disc, or a total or partial knee or hip replacement. For such injuries, expenses attributable to dates of injury before April 1, 2006, are paid by a special fund, and expenses attributable to dates of injury on or after April 1, 2006, are paid by employer or insurer.
 - (ii) There is no statute of limitation for occupational injuries. For such injuries, benefits or treatment expenses becoming due 12 years after the date of injury or death or the last payment of compensation, other than for treatment or burial expenses, are paid by a special fund.
- d. Total disability benefits lapse if employee dies without filing application for hearing unless death was caused by injury. *State v. LIRC*, 136 Wis. 2d 281 (1987).

C. Benefits [§ 3.96]

See also [W.C. Handbook](#), *supra* § 3.3, ch. 6.

1. In general, benefit rates are a function of employee's wage and state benefit ceiling.
 - a. Under [Wis. Stat. § 102.11](#), an employee's wage is calculated as follows:
 - (1) For full-time employees, the wage is generally the higher of the employee's hourly pay multiplied by the hours in a normal full-time workweek as established by the employer (presumed to equal 40 hours for most employment) or the employee's average weekly earnings in the 52 weeks prior to injury.
 - (2) For part-time employees, the wage is generally the higher of the employee's hourly pay multiplied by the average hours worked in the 52 weeks prior to injury or the employee's average weekly earnings in the 52 weeks prior to injury.
 - (a) If the employee has a second job or has worked part time for less than 12 months before the injury, the wage is calculated based on the normal full-time workweek as established by the employer.
 - (b) An employer may rebut an employee's eligibility for full-time benefits with evidence that the employee chose to work less than full time, such as a written statement signed by the employee or an employment application indicating an hour or shift preference.
 - (c) When calculating average weekly earnings, do not include health insurance premiums, *Theuer v. LIRC*, 2001 WI 26, 242 Wis. 2d 29, and do not include weeks when no work was performed.

NOTE: The department audits and may correct the insurer's wage-rate report.

- b. Benefit ceiling
 - (1) Ceiling on temporary total disability (TTD) redetermined automatically every year based on state average annual earnings. The ceiling is \$994 per week for injuries occurring in 2018, \$1,016 per week for injuries occurring in 2019, \$1,051 per week for injuries occurring in 2020, \$1,094 per week for injuries occurring in 2021, and \$1,159 per week for injuries occurring in 2022. [Wis. Stat. § 102.11\(1\)](#); publication WKC-9572-P (revised Apr. 10, 2022), <https://dwd.wisconsin.gov/dwd/publications/wc/WKC-9572-P.pdf>.
 - (2) Ceiling on permanent partial disability (PPD) is changed by specific act of the legislature, usually on annual basis. For injuries occurring from January 1, 2017, through April 9, 2022, the ceiling is \$362 per week. For injuries occurring from April 10, 2022, through December 31, 2022, the ceiling is \$415 per week. For injuries occurring on or after January 1, 2023, the ceiling is \$430 per week. [Wis. Stat. § 102.11\(1\)](#); publication WKC-9572-P (revised Apr. 10, 2022), <https://dwd.wisconsin.gov/dwd/publications/wc/WKC-9572-P.pdf>. Consult WKC-9572-P for benefit rates.
- c. Benefit ceilings and rates fixed by date of injury; later changes do not apply. [Wis. Stat. §§ 102.03\(4\), 102.43\(7\)](#).

Exceptions

- (1) New period of TTD two years or more post-injury. [Wis. Stat.](#) § 102.43(7); *Chappy v. LIRC*, 136 Wis. 2d 172 (1987).
- (2) Permanent total disability (PTD) claims and claims for more than 24 months of continuous TTD if date of injury before January 1, 2001. [Wis. Stat.](#) § 102.44(1).
- (3) Social Security disability offset may reduce worker's compensation benefits if both benefits are received for concurrent months. [Wis. Stat.](#) § 102.44(5).

2. Temporary total disability (TTD)

- a. Weekly benefit equals two-thirds of employee's average weekly wage, subject to ceiling. [Wis. Stat.](#) § 102.43(1).
- b. Employee must have total wage loss from this employment. [Wis. Stat.](#) § 102.43(6).
- c. Employee must be in healing period from injury. [Wis. Stat.](#) § 102.44(3); *Knobbe v. Industrial Comm'n*, 208 Wis. 185 (1932).
- d. Three-day waiting period unless employee still disabled on or after eighth day. [Wis. Stat.](#) § 102.43.

NOTE: For examples on calculating the waiting period, see DWD, *Three-Day "Waiting Period" for Indemnity Payments*, <https://dwd.wisconsin.gov/wc/letters/insurance/pdf/3daywaiting.pdf> (last visited May 24, 2022) (enclosure for Worker's Compensation Insurance Letter INS 431 (Aug. 8, 2001)).

- e. Partial wage loss results in temporary partial disability benefit. [Wis. Stat.](#) § 102.43(2).
- f. *Ability* to work within limitations during healing period does not cut off TTD unless employer provides suitable work. [Wis. Admin. Code](#) § DWD 80.47. *But see* [Wis. Stat.](#) § 102.43(9).
- g. If an employee is suspended or terminated because of a crime related to employment, a drug-policy violation during the healing period, incarceration resulting from a criminal conviction, misconduct as defined in [Wis. Stat.](#) § 108.04(5), or substantial fault as defined in [Wis. Stat.](#) § 108.04(5g)(a), TTD can be cut off. [Wis. Stat.](#) § 102.43(9); *DWD v. LIRC*, 2018 WI 77, 382 Wis. 2d 611; *Operton v. LIRC*, 2017 WI 46, 375 Wis. 2d 1; *Easterling v. LIRC*, 2017 WI App 18, 374 Wis. 2d 312.
- h. Voluntary retirement unrelated to a work injury may preclude entitlement to temporary disability. *Mueller v. LIRC*, 2019 WI App 50, 388 Wis. 2d 602.

3. Vocational rehabilitation benefits

- a. Employee with significant permanent disability who requires retraining is eligible for additional weekly benefits (TTD) plus costs of tuition, fees, books, travel, and

maintenance expense. [Wis. Stat.](#) §§ 102.61, 102.43(5); [Wis. Admin. Code](#) § DWD 80.49(10).

- b. If Division of Vocational Rehabilitation (DVR) finds employee eligible for services, and is able to provide those services, employee may receive them from DVR. [Wis. Stat.](#) § 102.61(1).
 - c. If DVR finds employee eligible for services, but is unable to provide those services, a private rehabilitation counselor may provide services in lieu of DVR. [Wis. Stat.](#) § 102.61(1m).
 - d. Offer of *suitable employment* may prevent liability for rehabilitation benefits; however, discharge of employee for good cause after offer of suitable employment negates the defense. It is unclear if a discharge for misconduct precludes TTD payment to a DVR candidate. [Wis. Stat.](#) § 102.61(1g); *Oshkosh Corp. v. LIRC*, 2011 WI App 42, 332 Wis. 2d 261.
 - e. If DVR approves training, rebuttable presumption of eligibility applies, at least to first 80 weeks. *Massachusetts Bonding & Ins. Co. v. Industrial Comm'n*, 275 Wis. 505 (1957); *Beloit Corp. v. LIRC*, 152 Wis. 2d 579 (Ct. App. 1989); *Dane Cnty. Hosp. & Home v. LIRC*, 125 Wis. 2d 308 (Ct. App. 1985). *But see* [Wis. Stat.](#) § 102.61(1) (mandating payment of necessary “costs of tuition, fees, books, and travel” incurred for training by employer or insurer, which may remove legal basis underlying *Massachusetts Bonding* presumption).
 - f. If private rehabilitation counselor is used, weaker statutory presumption of eligibility applies to first 80 weeks of training. [Wis. Stat.](#) § 102.61(1m), (2).
 - g. PPD payments interrupted while TTD being paid. [Wis. Stat.](#) § 102.32(6)(e).
 - h. There is no longer a reduction in compensation for TTD based on wages earned by an employee working part time for the first 24 hours of employment, and an employee must report such wages to the worker’s compensation insurance carrier or self-insured employer. [Wis. Stat.](#) § 102.43(5)(c).
 - i. An ALJ may issue a prospective order for future courses of instruction or retraining. [Wis. Stat.](#) § 102.18(1)(b)2.
4. Permanent partial disability
- a. Generally
 - (1) If practitioner finds permanent measurable loss of physical or mental function, PPD is payable.
 - (2) Amount depends on degree, formula, and benefit rate.
 - (3) Death benefits may be due for PPD when death occurs before a PPD rating is formally established. *Edward Bros. v. LIRC*, 2007 WI App 128, 300 Wis. 2d 638.

b. *Schedule* disability. See [Wis. Stat.](#) §§ 102.52, 102.555; [Wis. Admin. Code](#) §§ DWD 80.25, DWD 80.26, DWD 80.32; *Mednicoff v. DILHR*, 54 Wis. 2d 7 (1972).

- (1) Permanent disability is affecting scheduled part of body (arms, legs, vision, and hearing).
- (2) Benefit is computed by multiplying degree of loss by figure listed in schedule for affected body part; result equals number of weeks PPD paid.
- (3) No additional benefits are paid for loss of earning capacity.
- (4) Disability for injury to dominant hand increased by 25% for injuries after January 1, 1994, for amputation or total loss of use of arm, hand, thumb, or finger, or amputation of more than two-thirds of the distal joint of a finger. [Wis. Stat.](#) § 102.54.

c. *Nonschedule* disability

- (1) Generally. [Wis. Stat.](#) § 102.44(3); see also [W.C. Handbook](#), *supra* § 3.3, § 6.23.

Permanent partial disability *not* specified in [Wis. Stat.](#) §§ 102.52–.56, affecting torso (back), head, mental faculties, and, in some cases, allergy or sensitivity, but excluding hearing or vision.

- (2) Functional rating. [Wis. Stat.](#) § 102.44(6)(h).

Physician's percentage impairment rating multiplied by 1,000 weeks; result equals number of weeks benefit payable at PPD rate, e.g., \$362 per week in 2021.

- (3) Loss of earning capacity. [Wis. Admin. Code](#) § DWD 80.34.

Estimate by vocational expert supersedes and replaces functional rating if

- (a) Employee is not offered work by employer at 85% or more of preinjury wages, [Wis. Stat.](#) § 102.44(6); or
- (b) Loss-of-earning-capacity percentage is higher than impairment rating determined by physician, [Wis. Stat.](#) § 102.44(6)(h).

d. Occupational hearing loss

Noise-induced hearing loss is compensated under special rules governing benefits and date of injury. [Wis. Stat.](#) § 102.555; *Harnischfeger v. LIRC*, 196 Wis. 2d 650 (1995); [Wis. Admin. Code](#) § DWD 80.25.

5. Permanent total disability

a. Generally. [Wis. Stat.](#) §§ 102.44(2), 102.47(1).

- (1) If employee is found permanently and totally disabled, paid PTD benefit.

- (2) Weekly benefit equals two-thirds of employee's average weekly wage, subject to ceiling (same as for TTD benefit).
 - (3) Dependent may be entitled to additional benefit on death, even if death is unrelated to injury.
 - b. Schedule
 - (1) By law, blindness or loss or paralysis of two limbs equals PTD. [Wis. Stat.](#) § 102.44(2).
 - (2) PTD can be awarded because of a combination of schedule and nonschedule injuries, provided a clear, ascertainable portion of total disability is attributed to the nonschedule injury. *Secura Ins. v. LIRC*, 2000 WI App 237, 239 Wis. 2d 315; *see also Mireles v. LIRC*, 2000 WI 96, 237 Wis. 2d 69.
 - c. Nonschedule

Employee who has total loss of earning capacity or whose earning capacity is so diminished that reasonably stable market does not exist (*odd lot*) because of nonschedule impairment, *see supra* para. 4.c., receives PTD. *Balczewski v. DILHR*, 76 Wis. 2d 487 (1977); *see also Cargill Feed Div. v. LIRC*, 2010 WI App 115, 329 Wis. 2d 206.
 - d. Supplemental benefits are available for older injuries resulting in permanent total disability. [Wis. Stat.](#) § 102.44(1).
6. Disfigurement. [Wis. Stat.](#) § 102.56; *County of Dane v. LIRC*, 2009 WI 9, 315 Wis. 2d 293.
 - a. Employee sustaining permanent disfigurement visible in normal course of employment is paid up to one year's earnings based on potential wage loss.
 - b. Amount determined by negotiation or decision by ALJ after hearing.
 - c. When an employee returns to or is offered work by the time-of-injury employer, compensation is not allowed unless employee sustains an actual wage loss.
 7. Per [Wis. Stat.](#) § 102.175, apportionment of liability occurs
 - a. When two or more accidental injuries have each contributed to a physical or mental condition for which benefits would be otherwise due; or
 - b. When a percentage of permanent disability was caused by an accidental injury and a percentage of permanent disability was caused by "other factors."
 8. Second injury fund: When new (primary) injury causes 200 weeks of PPD and employee has 200 weeks preexisting, additional benefits are payable from state fund. [Wis. Stat.](#) § 102.59.
 9. Nondisabling condition: When employee with nondisabling condition must change jobs because of increased risk and suffers wage loss, employee may claim one-time payment up to \$13,000. [Wis. Stat.](#) § 102.565.

10. Death benefit. [W.C. Handbook](#), *supra* § 3.3, ch. 7.
 - a. Generally
 - (1) Death benefit paid to dependents if
 - (a) Employee dies from injury, [Wis. Stat.](#) § 102.46; or
 - (b) Employee is receiving PTD at time of death from any cause, [Wis. Stat.](#) § 102.47(1).
 - (2) Benefit equals four times average annual earnings. [Wis. Stat.](#) § 102.46.
 - (3) Payment for total dependency made at TTD rate (two-thirds of wage), so runs about six years. [Wis. Stat.](#) § 102.46.
 - b. Dependents
 - (1) Must be related by legally recognized tie. [Wis. Stat.](#) § 102.51(2)(a); *see also* [W.C. Handbook](#), *supra* § 3.3, § 7.2.
 - (2) Domestic partner included. [Wis. Stat.](#) § 102.51.
 - (3) Nonmarital child included. *Zschock v. Industrial Comm'n*, 11 Wis. 2d 231 (1960).
 - (4) Employee's child born after employee's death included. [Wis. Stat.](#) § 102.51(4).
 - (5) Dependency may be
 - (a) By statutory presumption. [Wis. Stat.](#) § 102.51(1).
 - (b) Dependency in fact. [Wis. Stat.](#) § 102.48.
 - (c) Total or partial. [Wis. Stat.](#) § 102.48.
 - (d) Limited if life benefits exceed the statutory level. [Wis. Stat.](#) § 102.46.
 - (6) Dependency determined as of
 - (a) Date of injury if injury before January 1, 1984, [Wis. Stat.](#) § 102.51(4) (1981–82), *amended by* 1983 Wis. Act 98 (eff. Jan. 1, 1984); or
 - (b) Date of death if injury on or after January 1, 1984, [Wis. Stat.](#) § 102.51(4).
 - c. When primary benefit ends, children under 18 may receive state fund benefits. [Wis. Stat.](#) § 102.49.
 - d. Burial expenses payable up to \$10,000. [Wis. Stat.](#) § 102.50.

- e. Employer or insurer also must pay into state fund. [Wis. Stat.](#) § 102.49(5).
 - (1) Advance payments are permissible and may result in an interest credit. [Wis. Stat.](#) § 102.49(5)(cm).
 - (2) Effective April 29, 2021, if violation of an employer's drug or alcohol policy is causal to an employee's death, no payment is owed to the state fund. [Wis. Stat.](#) § 102.58(2).
- 11. Medical expenses. [W.C. Handbook](#), *supra* § 3.3, ch. 5.
 - a. Generally, employer liable for all reasonable and necessary medical expenses. [Wis. Stat.](#) § 102.42.
 - (1) Not subject to dollar limit.
 - (2) In occupational disease claim, medical expenses incurred before date of injury may be awarded. *United Wis. Ins. Co. v. LIRC*, 229 Wis. 2d 416 (Ct. App. 1999).
 - (3) Liability continues even after final order but subject to the statute of limitation. [Wis. Stat.](#) § 102.17(4); *Lisney v. LIRC*, 171 Wis. 2d 499 (1992).
 - (4) Payments by third party are reimbursable. [Wis. Stat.](#) § 102.30(7).
 - b. Choice of treating practitioner. [Wis. Stat.](#) § 102.42(2).
 - (1) First choice is not limited if licensed in-state practitioner is chosen; employee can choose out-of-state practitioner "by mutual agreement."
 - (2) Partners and clinics, as well as referrals to another practitioner, considered to be one practitioner.
 - (3) Second choice of in-state practitioner is unlimited, except employer or insurance carrier is entitled to notice.
 - (4) Any further choice must be by mutual agreement.
- 12. Alternative benefits may be accepted in lieu of above in certain situations involving members of religious sects. [Wis. Stat.](#) § 102.28(3).

D. Penalties [§ 3.97]

See [W.C. Handbook](#), *supra* § 3.3, ch. 8.

- 1. Employer's failure to report injury to insurer
 - a. Bad faith. [Wis. Stat.](#) § 102.18(1)(bp); [Wis. Admin. Code](#) § DWD 80.70.
 - (1) Must result from *malice* or *bad faith*.

- (2) Penalty up to 200% of compensation plus medical expenses, but not more than \$30,000.
 - b. Inexcusable delay
 - (1) Employer may also owe 10% penalty on payments delayed by failure to report, plus any finance or collection charges or interest on medical expense. [Wis. Stat.](#) § 102.22(1).
 - (2) Penalty pursuant to [Wis. Stat.](#) § 102.22(1) may not be imposed in addition to bad-faith penalty. [Wis. Stat.](#) § 102.18(1)(bp).
2. Insurer's failure to pay compensation. *Kimberly-Clark Corp. v. LIRC*, 138 Wis. 2d 58 (Ct. App. 1987).
 - a. Bad faith. *See supra* para. 1.a.

NOTE: Third-party administrator of the Uninsured Employers Fund does not have protection from a bad-faith tort claim under [Wis. Stat.](#) § 102.18(1)(bp). *Aslakson v. Gallagher Bassett Servs., Inc.*, 2007 WI 39, ¶ 7, 300 Wis. 2d 92.
 - b. Inexcusable delay. *See supra* para. 1.b.
 - c. Failure to pay interlocutory order—penalty up to 25%. [Wis. Stat.](#) § 102.18(1)(b).
 - d. Employer or carrier is liable under [Wis. Stat.](#) § 102.23(5) for not paying compensation during course of appeal, when injury is conceded and only question is which carrier is ultimately liable. *Bosco v. LIRC*, 2004 WI 77, 272 Wis. 2d 586.
 - e. Bankruptcy stay precludes employer penalty for nonpayment of worker's compensation claim that was not yet due when stay triggered by filing of bankruptcy petition. *Grede Foundries, Inc. v. LIRC*, 2012 WI App 86, 343 Wis. 2d 517.
3. Employer's illegal employment of minor. [Wis. Stat.](#) § 102.60.
 - a. Employer may be assessed a penalty equal to or double primary compensation, payable to the state, if minor is injured without work permit or at prohibited employment.
 - b. Liability is limited.
 - c. Liability payable by insurer if uncollectible from employer. [Wis. Stat.](#) § 102.62.
4. Employer's failure to insure for worker's compensation
 - a. Monetary penalties are severe. [Wis. Stat.](#) §§ 102.82, 102.85, 102.87, 102.88.
 - b. Closure of business and imprisonment may be imposed. [Wis. Stat.](#) §§ 102.28(4), 102.85(5)(b), 102.88.
5. Employer's unreasonable refusal to rehire employee

- a. Generally, an employer who fails to rehire injured employee without reasonable cause after employee has established prima facie claim may be liable for up to one year's lost wages. [Wis. Stat.](#) § 102.35(3).
 - b. Elements of employee's prima facie claim
 - (1) Must be an employee under [Wis. Stat.](#) § 102.07 who is injured in the course of employment. *West Bend Co. v. LIRC*, 149 Wis. 2d 110 (1989).
 - (2) Applied for rehire.
 - (a) No need to apply for rehire if the employee is terminated while on leave or if released by a doctor to return to previous job without restrictions. *Hill v. LIRC*, 184 Wis. 2d 101 (Ct. App. 1994).
 - (b) If employee is unable to return to job held at the time of injury, employee must express interest in performing other work. *Anderson v. LIRC*, 2021 WI App 44, 398 Wis. 2d 668.
 - (3) Employee denied rehire because of injury sustained while working for employer. *West Bend*, 149 Wis. 2d at 126; *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis. 2d 118 (Ct. App. 1994).
 - c. Burden shifts to employer
 - (1) If prima facie case is established, employer has burden to show reasonable cause for failure to rehire. *West Bend*, 149 Wis. 2d at 126.
 - (2) Employer must show that employee could not do the work for which the employee applied and that no other suitable work was available within employee's mental and physical limitations. [Wis. Stat.](#) § 102.35(3); *Universal Foods Corp. v. LIRC*, 161 Wis. 2d 1 (Ct. App. 1991).

NOTE: Union contract or written work rules govern.
 - (3) Discharge of injured employee must be in good faith; pro forma hiring not sufficient. *West Allis Sch. Dist. v. DILHR*, 116 Wis. 2d 410 (1984).
 - d. Benefits
 - (1) Wages lost during period of refusal not to exceed one year's wages.
 - (2) *One year* is considered a dollar limit, not a time limit, so that wages from other employment delay, but do not reduce, penalty.
6. Injury caused by employer's safety violation. [Wis. Stat.](#) § 102.57.

a. Generally, if injury is caused by employer's violation of safe-place statute or Wisconsin Administrative Code, employer pays penalty of 15% of primary compensation (\$15,000 ceiling on penalty). [Wis. Stat.](#) § 101.11(1).

b. Elements

(1) Notice

NOTE: Except when the violation is based on negligence of supervisor, employee must prove actual or constructive notice to employer of unsafe condition, practice, or equipment. *Strack v. Great Atl. & Pac. Tea Co.*, 35 Wis. 2d 51 (1967); *Eau Claire Elec. Co-op. v. Industrial Comm'n*, 10 Wis. 2d 209 (1960); *Uhrman v. Cutler-Hammer, Inc.*, 2 Wis. 2d 71 (1957).

(2) Causation

NOTE: Employee has burden of proving causation except when rule is violated and injury incurred is the kind that the violated rule was intended to prevent. *Milwaukee Forge v. DILHR*, 66 Wis. 2d 428 (1975); *L.M. Bickett Co. v. Industrial Comm'n*, 10 Wis. 2d 289 (1960).

c. Defenses

(1) Employee misconduct causing injury *may* be a defense. *Milwaukee Forge*, 66 Wis. 2d 428.

(2) Safety rule unlawful. *Manitowoc Co. v. Industrial Comm'n*, 273 Wis. 293 (1956).

(3) Guard not available. *Milwaukee Corrugating Co. v. Industrial Comm'n*, 197 Wis. 414 (1928).

7. Injury caused by employee safety violation or intoxication. [Wis. Stat.](#) § 102.58.

a. Employee may suffer 15% reduction in primary compensation (up to \$15,000) if injury caused by employee's failure to use safety device required by state statute when use enforced and device maintained or employee's failure to follow a reasonable safety rule when the employee has notice of such rule.

b. Violation of an employer's drug or alcohol policy may result in total loss of primary compensation or death benefits when that violation is causal to the injury.

c. Failure to obey safety rule enforced by employer with adequate notice to employee. [Wis. Stat.](#) § 102.58; *Milwaukee Forge*, 66 Wis. 2d at 433.

d. Intoxication. *Haller Beverage Corp. v. DILHR*, 49 Wis. 2d 233 (1970).

IV. DISPUTED CLAIMS PROCEDURE BEFORE HEARING [§ 3.98]

A. Employee Interview [§ 3.99]

1. Determine that attorney help is needed, *see supra* § [3.6](#).
2. Obtain relevant information from client, usually
 - a. Details of injury; if occurrence of injury is denied by insurer, names of witnesses
 - b. If occupational disease, detailed work history
 - c. Names of all treating practitioners
 - d. Hospitalizations
 - e. Course of medical treatment/symptoms
 - f. Current treatment status: Released from care? Still treating?
 - g. Preexisting related medical problems/injuries
 - h. Work history and education
 - i. DVR contact? Potential retraining claim?
 - j. Worker's compensation benefits received
 - k. Receipt of collateral benefits
 - (1) Sick pay or group disability insurance (has reimbursement agreement been signed?);
 - (2) Group medical payments (has reimbursement agreement been signed?);
 - (3) Welfare/Wisconsin Works (W-2), [Wis. Stat.](#) § 102.27(2)(b);
 - (4) Unemployment insurance, [Wis. Stat.](#) ch. 108;
 - (5) SSI/Social Security disability; or
 - (6) Child support obligations, [Wis. Stat.](#) § 102.27(2)(a).
 - l. Status of medical bills: Paid? Paid by client?
 - m. Wage rate when injured
3. Forms
 - a. Fill out rough draft of application for hearing for later use. Form WKC-7.
 - b. Explain and have client sign fee agreement.
 - c. Have client sign medical authorizations (other authorizations: DVR? Social Security?).

4. Explain to client typical delays in progress of claim.
 - a. Approximately six months from filing application to scheduling of hearing.
 - b. Expedited hearing may be scheduled at the division's discretion when specifically requested by employee, and the claim is ripe for hearing when request is made.
 - c. Prehearings routinely held in claims involving unrepresented applicants and rarely in selected cases involving multiple defendants or penalties.

B. Obtaining Medical and Vocational Support [§ 3.100]

See [W.C. Handbook](#), *supra* § 3.3, ch. 9.

1. Generally
 - a. Most disputes involve medical or vocational opinions.
 - b. Obtain support in writing before filing application for hearing.
2. Medical opinion
 - a. Use certified form for medical opinions unless you *know* practitioner will testify. Form WKC-16-B.
 - b. Form elicits answers on virtually every potential issue.
3. If claim for nonschedule PPD, *see supra* § 3.10:
 - a. Determine whether loss of earning capacity may exceed practitioner's impairment rating.
 - b. If so, arrange for evaluation by vocational expert and obtain report on verified form. Form WKC-6743.

C. Application for Hearing and Answer [§ 3.101]

See Form WKC-7.

NOTE: The division has stated it will follow the prior procedures followed by the department in administering litigated worker's compensation claims. [Wis. Admin. Code](#) ch. DWD 80; [W.C. Handbook](#), *supra* § 3.3, ch. 9.

1. Generally, when claim has been denied and employee has appropriate support (medical and vocational) for claim, application for hearing should be filed with supporting evidence by mailing three copies of application and one copy of that evidence to the department. [Wis. Stat.](#) § 102.17(1)(a); [Wis. Admin. Code](#) § HA 4.04(2).
2. Service

- a. The division serves application on adverse parties. [Wis. Stat.](#) § 102.17(1)(a); [Wis. Admin. Code](#) § HA 4.04(2).
 - b. Copy of supporting medical and vocational reports must be served by a party directly on opposing party. [Wis. Admin. Code](#) § HA 4.15(6).
 - c. When claiming bad faith, party must provide employer, insurer, the department, and the division written notice stating with reasonable specificity the basis for the claim. [Wis. Stat.](#) § 102.17(1)(a)3.
3. Answer. Form WKC-19.
 - a. Respondent must file answer with the division within 20 days, with copy directly to adverse party. [Wis. Admin. Code](#) § HA 4.04(2).
 - b. Failure to file timely answer may result in default. (Historically only in aggravated cases. The department has instituted a program of sending a notice of potential default in cases in which no answer is filed. If no answer is filed after the department has sent a notice in those situations, an ALJ may in fact issue a default order.)
 4. Amendments. [Wis. Admin. Code](#) § HA 4.07.
 - a. Amendments to application or answer may be made by letter to the division before date notice of hearing issued.
 - b. Send copy of letter to other parties.
 - c. State reason for amendment.
 5. Advance notice for vocational opinion
 - a. A party intending to present expert testimony or verified reports as to loss of earning capacity *must* give notice to all parties and the division of intention to do so and name of expert witness at least 60 days before date of hearing; opposing party must give similar notice 45 days before date of hearing. [Wis. Stat.](#) § 102.17(7)(b).
 - b. If notice is late, evidence may be received if good cause for delay shown and if no party prejudiced by delay. [Wis. Stat.](#) § 102.17(7)(c).

D. Insurer's Preparation [§ 3.102]

1. Obtain medical records
 - a. If not already in hand, usually obtain full set of medical records from treating practitioners.
 - b. May request signed authorization from employee.
2. Statement from employee. [Wis. Stat.](#) § 102.123.

- a. Insurer may take written or recorded statement from employee.
 - b. Copy must be provided to employee within reasonable time after statement is taken if the statement is to be used at hearing.
3. Impleading other insurers: For good cause shown (usually supporting medical report), the department or the division will implead additional insurers. [Wis. Stat.](#) § 102.17(1)(a).
4. Medical examinations
- a. Insurer is entitled to medical examinations by practitioners selected by insurer. [Wis. Stat.](#) § 102.13(1)(a).
 - b. Must usually be within 100 miles of employee's residence or location where treatment of injury is rendered. [Wis. Stat.](#) § 102.13(4).
 - c. Employee is entitled to adequate notice and prepayment of travel expense (51 cents per mile, effective July 1, 2012). [Wis. Stat.](#) § 102.13(1)(b); DWD, *Mileage Reimbursement Rates for Worker's Compensation Claimants*, <https://dwd.wisconsin.gov/wc/workers/mileage-rates.htm> (last visited May 24, 2022).
 - d. Employee's unreasonable refusal may suspend or bar claim. [Wis. Stat.](#) § 102.13(1)(c).
5. Vocational evaluations: Insurer is entitled to vocational evaluations by vocational experts selected by insurer. [Wis. Stat.](#) § 102.13(1)(b).

E. Prehearing Conference [§ 3.103]

1. Generally. *See* [Wis. Stat.](#) § 102.17(1)(b).
 - a. In selected cases, 30-minute prehearing conference before ALJ scheduled by notice two to six weeks in advance to all parties.
 - b. Prehearings are omitted in most cases except as to unrepresented employees.
 - c. Purpose is to settle case, or at least to narrow or clarify issues.
 - d. Employee should be present, if possible.
2. Preparation
 - a. Employee to provide current
 - (1) Medical reports, DWD form notice of prehearing. Form WKC-3.
 - (2) Record of medical expense claimed
 - (3) Record of collateral benefits received
 - b. Employer or insurer to provide

- (1) Record of benefits paid or conceded. Form WKC-13.
 - (2) Wage information if the wage is less than the statutory maximum. Form WKC-13A.
 - (3) Basis for defense
3. After prehearing
- a. ALJ may order disclosure or exchange of information or written material subject to suspension of claim or exclusion of evidence. [Wis. Stat.](#) § 102.17(1)(b).
 - b. *See also* [Wis. Admin. Code](#) §§ DWD 80.21, HA 4.14 (permitting the department or division to request exchange of expert-witness reports).
 - c. Name of witness to testify as to wage-earning impairment must be given at least 60 days before hearing. [Wis. Stat.](#) § 102.17(7)(b).
 - d. If ALJ determines, after prehearing, that only dispute is which of two or more insurers is liable, ALJ may enter interim order against one or more insurers to pay compensation pending final hearing. [Wis. Stat.](#) § 102.175(2).
4. The division selects small portion of prehearings to be conducted by conference call; party can request for convenience.

F. Hearing and Order [§ 3.104]

1. Certificate of Readiness and Request to Schedule a Hearing required to be filed with the division before a hearing or settlement conference will be scheduled. The division may refuse to schedule a case for hearing unless this form is filed. The division's goal is to ensure that claims are actually ripe for a hearing or settlement conference before setting a date. Respondent has 15 days to object in writing to the Certificate of Readiness. A settlement conference rather than a hearing can be requested. Settlement Conference is conducted by a select number of ALJs with the intention of avoiding the need for a formal hearing. Form WKC-15717-DHA-E.
2. Location and notice of hearing
 - a. Location. [Wis. Admin. Code](#) § HA 4.11(2).
 - (1) Formal hearings are held at about 15 specified cities in state.
 - (2) Initial hearing site usually at employee's choice.
 - (3) Later hearing may be available at location of injury or where treating practitioner has office.
 - b. Notice
 - (1) Ten days' notice required. [Wis. Stat.](#) § 102.17(1)(a).

- (2) Notice usually issued four to six weeks before hearing.
3. Postponement or continuance of hearing. [Wis. Admin. Code](#) § HA 4.08(2)–(4).
 - a. The department has resisted attempts to postpone hearings once scheduled.
 - b. Chance of successful postponement diminishes sharply as hearing date approaches.
 - c. Attorney conflict or unavailability generally not sufficient reason.
 - d. ALJ may permit or encourage deposition of unavailable witness.
 - e. There is no clear right to a postponement or continued (second) hearing. [Wis. Stat.](#) § 102.18(1)(a); *Nelson Mill & Agri-Ctr., Inc. v. DILHR*, 67 Wis. 2d 90 (1975).
 - f. Failure to appear may result in order on default. *See also Baldwin v. LIRC*, 228 Wis. 2d 601 (Ct. App. 1999).
4. Subpoena
 - a. Issued by the division, any party, or a party’s attorney of record. [Wis. Stat.](#) § 102.17(2m), (2s), (3); Form WKC-17.
 - b. Signed by party.
 - c. May be used to compel attendance at hearing or production of documents.
 - d. Fees and mileage due under [Wis. Stat.](#) § 814.67(1)(b). [Wis. Admin. Code](#) § HA 4.17.
5. Depositions
 - a. Depositions permitted only for witnesses who are out of state, too disabled to attend, or, in certain circumstances, members of legislature. [Wis. Stat.](#) § 102.17(1)(f).
 - b. Depositions for discovery prohibited, but occasionally allowed for unavailable (in-state) witness. [Wis. Admin. Code](#) § HA 4.10.
6. Nature of hearing
 - a. Generally
 - (1) Formality of hearing before ALJ roughly comparable to trial to court, without opening or closing argument.
 - (2) Employee proceeds first and has burden of proof. *Lewellyn v. Industrial Comm’n*, 38 Wis. 2d 43 (1968).
 - (3) Witnesses are sworn by ALJ.
 - (4) Court reporter marks exhibits (applicant’s: A, B, C, ...; respondent’s: 1, 2, 3, ...).

b. Admission of evidence

(1) Rules of evidence. [Wis. Admin. Code](#) § HA 4.11(1).

(a) Evidence is usually limited to areas of dispute.

(b) Hearsay may be admitted if it has probative value.

(c) In a non-worker's compensation proceeding, uncorroborated written hearsay evidence was held not to constitute substantial evidence to support an administrative agency's factual findings. However, [Wis. Stat.](#) ch. 102 administrative proceedings are covered by [Wis. Stat.](#) § 102.17(1)(h). *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, 278 Wis. 2d 111.(d) On appeal, rules of evidence at times applied by appellate court. *City of Superior v. DILHR*, 84 Wis. 2d 663 (1978).

(2) Admission of records and reports

(a) Certified reports by practitioners and vocational experts, *see supra* § 3.14, must be filed at least 15 days before hearing except for good cause. [Wis. Stat.](#) § 102.17(1)(d)3.; [Wis. Admin. Code](#) § HA 4.15(5).(b) Hospital and physician records may be introduced by certificate or affidavit. [Wis. Stat.](#) § 102.17(1)(d).(c) Itemized medical expense and mileage claims must be filed with the division and served on all parties at least 15 days before hearing, or they may be excluded. [Wis. Stat.](#) § 102.17(8); Form WKC-3.

(3) Use of statement

If furnishing of copy or transcript of employee's statement not timely, may not be used at hearing. [Wis. Stat.](#) § 102.123.

c. Right to fair hearing. Each party has right to

(1) Reasonably know claims made.

(2) Meet such claims by competent evidence.

(3) Be heard by counsel on probative force of evidence. *Theodore Fleisner, Inc. v. DILHR*, 65 Wis. 2d 317 (1974); *Waste Mgmt. Inc. v. LIRC*, 2008 WI App 50, ¶ 9, 308 Wis. 2d 763.

7. Posthearing procedure

a. Briefs may be permitted following hearing but are usually discouraged.

- b. Independent medical examination. [Wis. Stat.](#) § 102.17(1)(g).
 - (1) ALJ may appoint practitioner to examine employee or render opinion based on records.
 - (2) Cost paid by employer.
 - (3) Procedure rarely used.
 - (4) Cross-examination of expert is subject to the division's discretion. *Aurora Consol. Health Care v. LIRC*, 2012 WI 49, 340 Wis. 2d 367.

- c. Order
 - (1) ALJ issues written findings and order within 90 days after close of record. [Wis. Stat.](#) § 102.18(1).
 - (2) Signed copy is put in file, unsigned copies are mailed to parties.
 - (3) Order is
 - (a) Final and bars further claims, *or*
 - (b) Interlocutory, and claim remains open indefinitely; almost always depends on medical opinion as to likelihood of further disability or medical treatment, [Wis. Stat.](#) § 102.18(1)(b).
 - (c) Limited to narrow issues (e.g., disfigurement), with claim for other benefits open subject to [Wis. Stat.](#) § 102.17(4).
 - (4) ALJ may modify, reverse, or set aside order within 21 days after mailing findings and order to parties in interest. [Wis. Stat.](#) § 102.18(3).
 - (5) If two ALJs have held hearings and cannot agree, a tie-breaker ALJ may be appointed. [Wis. Stat.](#) § 102.18(1)(c).

G. Jurisdiction Following Order [§ 3.105]

1. Generally, even if final order is issued after hearing, claims may be reopened or remain open in limited situations.
2. Final order does not per se limit right to claim future medical expense, subject to statute of limitation. *Lisney v. LIRC*, 171 Wis. 2d 499 (1992).
3. If occupational disease is mistaken for accidental injury claim, employee may request reopening within three years after date of order. [Wis. Stat.](#) § 102.18(5); *Kwaterski v. LIRC*, 158 Wis. 2d 112 (Ct. App. 1990).

4. Labor and Industrial Review Commission (LIRC), not ALJ, may set aside ALJ or LIRC order within one year after date of order because of mistake or newly discovered evidence. [Wis. Stat.](#) § 102.18(4)(c); *Moore v. Industrial Comm'n*, 4 Wis. 2d 208 (1958).
5. Occupational disease is subject to the statute of limitation in [Wis. Stat.](#) § 102.17(4) (12 years after last payment of compensation); any order regarding occupational disease may be reopened from time to time. [Wis. Stat.](#) § 102.18(6).
6. Claims for loss of earning capacity are barred by 85% rule, *see supra* § 3.10; may be reopened under certain conditions after final order. [Wis. Stat.](#) § 102.44(6)(b); *Mireles v. LIRC*, 2000 WI 96, 237 Wis. 2d 69.
7. Final awards for loss of earning capacity may not be reopened or vacated if an employer subsequently rehires an employee, satisfying the 85% rule, *see supra* § 3.10. *Schreiber Foods, Inc. v. LIRC*, 2009 WI App 40, 316 Wis. 2d 516.
8. Liability under [Wis. Stat.](#) §§ 102.35(3), 102.43(5), 102.49, 102.57, 102.58, 102.59, 102.60, and 102.61 remains open unless order mentioned statute. [Wis. Stat.](#) § 102.18(4)(a).

V. APPEALS [§ 3.106]

See [W.C. Handbook](#), *supra* § 3.3, ch. 10.

A. Petition for Review by LIRC [§ 3.107]

1. May be filed by any *party in interest*. [Wis. Stat.](#) § 102.18(3).
2. Must be received by the department, the division, or LIRC within 21 days after date of ALJ's decision, by mail, hand delivery, or fax. [Wis. Admin. Code](#) §§ LIRC 1.02, LIRC 1.025, LIRC 3.01.
3. Late petition may be accepted if it "shows that the petition was filed late for a reason that was beyond the petitioner's control." [Wis. Stat.](#) § 102.18(3).
4. Opposing party may file answer within 21 days after receipt of copy of petition. [Wis. Admin. Code](#) § LIRC 1.027.
5. Petition may be withdrawn under specified conditions. [Wis. Admin. Code](#) § LIRC 1.03.
6. Parties may settle claim before LIRC decision. [Wis. Stat.](#) § 102.18(4)(d).
7. LIRC review is of record of case, including synopsis of testimony and exhibits. [Wis. Admin. Code](#) § LIRC 1.04.
8. Oral argument rarely granted by LIRC. [Wis. Admin. Code](#) § LIRC 1.06.
9. Parties have right to file briefs. [Wis. Admin. Code](#) § LIRC 1.07.

10. LIRC must affirm, reverse, set aside, or modify findings or order, or must direct taking of additional evidence by the department or the division. [Wis. Stat.](#) § 102.18(3); [Wis. Admin. Code](#) § LIRC 1.05.

B. Circuit Court Review [§ 3.108]

1. Strict compliance with statute is required to obtain jurisdiction. [Wis. Stat.](#) § 102.23(1)(a); *Cruz v. DILHR*, 81 Wis. 2d 442, 449 (1978).
 - a. Only orders that grant or deny compensation are reviewable; common-law certiorari unavailable to review LIRC order that did not grant or deny compensation. *Vidal v. LIRC*, 2002 WI 72, 253 Wis. 2d 426; *Guerin v. LIRC*, 121 Wis. 2d 183, 186–87 (Ct. App. 1984).
 - b. Action must be commenced within 30 days after date of order. [Wis. Stat.](#) § 102.23(1)(a).
 - c. Procedure is to file summons and complaint with clerk of court and then serve enough authenticated copies on LIRC, all within 30 days. [Wis. Stat.](#) § 102.23(1)(a), (b); *Gomez v. LIRC*, 153 Wis. 2d 686, 691–93 (Ct. App. 1989).
 - d. Service by mail is effective only if pleadings are actually received by LIRC in Madison within appeal period. [Wis. Admin. Code](#) § LIRC 3.05.
 - e. [Wis. Stat.](#) § 801.15(5) does not extend appeal period by three days when service is made by mail. *Schiller v. DILHR*, 103 Wis. 2d 353, 356–57 (Ct. App. 1981).
 - f. Only a *party aggrieved* by the order may appeal. *Cornwell Pers. Assocs. v. DILHR*, 92 Wis. 2d 53, 61–63 (Ct. App. 1979).
 - g. All adverse parties must be made defendants along with LIRC. *Xcel Energy Servs., Inc. v. LIRC*, 2013 WI 64, 349 Wis. 2d 234; [Wis. Admin. Code](#) § LIRC 3.05.
 - h. Service for appeals from department orders under [Wis. Stat.](#) § 102.16(2m)(e) can be achieved by serving either the department or LIRC with as many copies of summons and complaint as there are defendants. *McDonough v. DWD*, 227 Wis. 2d 271 (1999).
2. Venue is in county where plaintiff resides or, if plaintiff is a state agency, in county where defendant resides. [Wis. Stat.](#) § 102.23(1)(a).
 - a. If plaintiff resides outside Wisconsin, venue is in Dane County. *Aparacor, Inc. v. DILHR*, 97 Wis. 2d 399, 406–07 (1980).
 - b. Action can be brought in any circuit court if all parties stipulate and that court agrees. [Wis. Stat.](#) § 102.23(1)(a).
3. Provisions of [Wis. Stat.](#) ch. 227 and [Wis. Stat.](#) § 801.02 do not apply. [Wis. Stat.](#) § 102.23(1)(a).
4. LIRC must serve its answer within 20 days after service of complaint. [Wis. Stat.](#) § 102.23(1)(c), (cm).

- a. Other defendants may serve answer within same time period, except that insurance companies have 45 days in which to respond. [Wis. Stat.](#) § 102.23(1)(c), (cm).
- b. Answer may include counterclaim or cross-complaint asking for review of order. [Wis. Stat.](#) § 102.23(1)(c).
5. Any defendant may make motion to dismiss. *Rathjen v. Industrial Comm'n*, 233 Wis. 452, 456–57 (1940).
6. Court acts in appellate capacity on record made before LIRC. [Wis. Stat.](#) § 102.23(1)(d).
7. Oral argument is at discretion of circuit court. [Wis. Stat.](#) § 102.23(1)(d).
8. Standard of review: Findings of fact are upheld when they are supported by credible and substantial evidence. [Wis. Stat.](#) § 102.23(6). Conclusions of law do not receive deference and are reviewed de novo. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496. Nonetheless, a court will give “due weight” to LIRC’s experience, technical competence, and specialized knowledge as warranted. *Id.*

C. Court of Appeals [§ 3.109]

1. Time limit same as in regular civil case under [Wis. Stat.](#) § 808.04(1), either 90 or 45 days depending on when notice of entry of judgment is served. [Wis. Stat.](#) § 102.25(1).
2. [Wis. Stat.](#) § 801.15(5) does *not* extend appeal period by three days when notice of entry of judgment is served by mail. *Bruns v. Muniz*, 97 Wis. 2d 742, 746 (Ct. App. 1980).
3. Appeal is initiated by filing notice of appeal with clerk of court in which judgment was entered. [Wis. Stat.](#) § 809.10(1)(a).
4. Timely service of notice of appeal should be made on clerk of court of appeals and other parties, but failure to do so is not jurisdictional. *See State v. Rhone*, 94 Wis. 2d 682, 687–88 (1980). For electronic filing users in the circuit court case, receipt of the notice of appeal through the circuit court electronic filing system constitutes service of the document. [Wis. Stat.](#) § 809.10(h). The appellant must serve “paper parties” (non-electronic filers) by traditional methods. *Id.* For rules regarding filing and service of the notice of appeal and other papers, see generally [Wis. Stat.](#) § 809.80 (filing and service of documents by traditional methods) and [Wis. Stat.](#) § 809.801 (appellate electronic filing).
5. Venue is in district that contains circuit court from which judgment is appealed. [Wis. Stat.](#) § 752.21.
6. Rules of appellate procedure apply as in other civil appeals. *Boyle v. Industrial Comm'n*, 8 Wis. 2d 601, 605 (1959).

D. Wisconsin Supreme Court [§ 3.110]

1. Petition for review. [Wis. Stat.](#) § 808.10.

- a. Must be filed (actually received in supreme court) within 30 days after date of court of appeals' decision. [Wis. Stat.](#) § 809.62(1m); *St. John's Home v. Continental Cas. Co.*, 150 Wis. 2d 37, 42–43 (1989).
 - b. Granting of petition is matter of judicial discretion, not of right. [Wis. Stat.](#) § 809.62(1r).
 - c. Opposing party may file response within 14 days after service of petition. [Wis. Stat.](#) § 809.62(3).
2. Petition to bypass court of appeals by party. [Wis. Stat.](#) §§ 808.05(1), 809.60.
 3. Bypass by certification of court of appeals or upon motion of supreme court. [Wis. Stat.](#) §§ 808.05(2), (3), 809.61.

VI. SETTLEMENTS [§ 3.111]

See generally [W.C. Handbook](#), *supra* § 3.3, ch. 11.

A. Stipulation [§ 3.112]

See [Wis. Stat.](#) § 102.16(1).

1. If parties agree as to benefits due, written stipulation may be filed for computation and accrual of benefits. [Wis. Admin. Code](#) §§ DWD 80.10, HA 4.09; Forms WKC-135, WKC-177.
2. ALJ's order dismisses any pending application for hearing without prejudice.
3. Claim can be reopened subject to [Wis. Stat.](#) § 102.17(4).
4. Insurer may later withdraw stipulation.

B. Limited Compromise [§ 3.113]

See [Wis. Stat.](#) § 102.16(1).

1. Parties may enter limited compromise that is final for some issues (e.g., period of TTD and medical expense to date) but not others; exact nature of agreement must be clearly spelled out. *Pigeon v. DILHR*, 109 Wis. 2d 519, 527 (1982); [Wis. Admin. Code](#) § DWD 80.03; Form WKC-176.
2. ALJ will review, *see infra* § 3.28, and approve or reject.
3. May be reviewed within one year.

C. Full Compromise [§ 3.114]

1. Generally. [Wis. Stat.](#) § 102.16(1); [Wis. Admin. Code](#) § DWD 80.03; Form WKC-176.
 - a. Full and final settlement of worker's compensation claim is called a *compromise*.

- b. The term “compromise” must appear in agreement.
 - c. Compromise may be in writing or placed on record at time of hearing.
 - d. Any compromise that does not consider Medicare’s interests in medical expenses previously paid by Medicare, or medical expenses Medicare may pay at some point in the future, might violate the Medicare as Secondary Payer Act, and might not be binding on Medicare. 42 [C.F.R.](#) § 411.46.
2. Approval. [Wis. Admin. Code](#) § DWD 80.03(2).
- a. Compromise not binding until approved by order.
 - b. ALJ reviews carefully to see whether valid dispute exists, usually supported by conflicting medical and vocational opinions creating a significant range of results (at least 10% variation in estimates of impairment).
 - c. If ALJ refuses to approve
 - (1) No appeal.
 - (2) Parties must proceed to hearing or agree on limited compromise, *see supra* § [3.27](#).
3. Setting aside compromise. [Wis. Stat.](#) § 102.16(1).
- a. If a party requests modification or setting aside of compromise order within one year from date of order, ALJ will review.
 - b. Hearing is scheduled at discretion of ALJ.
 - c. In practice, compromises are never set aside except upon showing of
 - (1) Gross inequity, fraud, duress, mutual mistake; *or*
 - (2) Important newly discovered evidence.
4. Lump sums
- a. No compromise agreement may require payment of unaccrued lump sum to employee. [Wis. Admin. Code](#) § DWD 80.03(1)(d).
 - b. Compromise agreement may provide for deposit of unaccrued amount in restricted account in financial institution. [Wis. Admin. Code](#) § DWD 80.03(1)(e).
 - c. Compromise agreement may provide for purchase of annuity. [Wis. Admin. Code](#) § DWD 80.03(1)(e).

VII. ATTORNEY FEES AND COSTS [§ 3.115]

See [W.C. Handbook](#), *supra* § 3.3, ch. 1.

A. Limitation [§ 3.116]

1. Attorney fees for representation of employee are limited to 20% of amount collected that was in dispute. [Wis. Stat.](#) § 102.26(2).
2. When benefits not in dispute, attorney fees are limited to 10% of amount collected but not more than \$250. [Wis. Stat.](#) § 102.26(2).
3. No fee is due for amounts reimbursed to nonindustrial disability or medical insurer. [Wis. Stat.](#) § 102.30(7).
4. Fees on awards of PTD limited to 500 weeks. [Wis. Admin. Code](#) § DWD 80.43(3).

B. Approval; Penalties [§ 3.117]

1. [Wis. Stat.](#) ch. 102 does not require approval of fees except if to be protected, *see infra* § 3.32.
2. Serious penalties may be invoked if employee overcharged. [Wis. Stat.](#) § 102.26(4).
3. Safest approach is to submit for approval and direct payment.

C. Protection; Advancement [§ 3.118]

1. If employee consents, fees and costs, once approved, will be paid or reimbursed directly to attorney. [Wis. Stat.](#) § 102.26(3).
2. Fees on future benefits (except PTD benefits) will, on request, be reduced to present value and paid as lump sum.

D. Costs [§ 3.119]

1. Reimbursable costs include costs of medical and vocational records, reports, live testimony, and subpoena fees.
2. ALJ will usually not approve phone, copying, or travel costs.
3. Costs should be itemized and substantiated by receipts showing payment.

Chapter 4

Wisconsin Family or Medical Leave Act

Pamela M. Ploor
Stafford Rosenbaum LLP
Milwaukee

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 232; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2022, No. 795; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-112 (Apr. 19, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 24,846 (Apr. 26, 2022).

CAUTION: This chapter addresses the Wisconsin Family or Medical Leave Act (WFMLA) only. Comparing the provisions of this act with the provisions of the federal Family and Medical Leave Act (federal FMLA) is beyond the scope of this chapter, but attorneys should familiarize themselves with the federal Family and Medical Leave Act of 1993. See 29 [U.S.C.](#) §§ 2601–2654 and 29 [C.F.R.](#) §§ 825.100–825.803. The federal FMLA differs from the Wisconsin law in many ways. If the employee qualifies for leave under Wisconsin and federal law, the provision that provides the more generous leave policies to the employee typically prevails.

PRACTICE TIP: Helpful resources on WFMLA include (1) Wisconsin Department of Workforce Development, *Wisconsin Family and Medical Leave Act Overview*, <https://dwd.wisconsin.gov/er/civilrights/fmla/default.htm> (last visited May 5, 2022), and (2) Wisconsin Labor & Industry Review Commission, *Wisconsin Equal Rights Decision Digest*, §§ 300–390 (2017), https://lirc.wisconsin.gov/er_digest.htm.

I. BASIC WFMLA INFORMATION [§ 4.120]

A. 12-Month Period [§ 4.121]

An employee’s entitlement to leave is based on a 12-month period that is defined as a calendar year. [Wis. Stat.](#) § 103.10(3)(a), (4)(b); see also [Wis. Admin. Code](#) § DWD 225.01(1)(m).

PRACTICE TIP: The federal FMLA allows different 12-month periods (i.e., rolling backward; rolling forward; fixed year; calendar), so employers need to consider the states in which they have employees, any state or local family and medical leave laws, and how to select a 12-month period that allows the most administrative ease in leave administration. The federal FMLA allows employers that must comply with a state law that mandates a certain 12-month period, such as the WFMLA, to select a different 12-month period in other states. See 29 [C.F.R.](#) § 825.200(d)(2).

B. Employers Covered [§ 4.122]

Employers are covered if they are persons or entities employing at least 50 permanent employees. [Wis. Stat.](#) § 103.10(1)(c); see also [Wis. Admin. Code](#) § DWD 225.01(2) (defining *employer* as having at least 50 permanent employees during at least six of the preceding 12 calendar months). Local or municipal governments are also covered. [Wis. Stat.](#) § 103.10(1)(c); [Wis. Admin. Code](#) § DWD 225.01(1)(j).

C. Employees Covered [§ 4.123]

1. Covered employees are individuals employed by the same employer for more than 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the preceding 52-week period. [Wis. Stat.](#) § 103.10(2)(c); [Wis. Admin. Code](#) §§ DWD 225.01(3), (4). In computing whether employees meet the 1,000 hours threshold, employers must include

hours paid to an employee through vacation, sick time, or other paid leave. [Wis. Admin. Code](#) § DWD 225.01(4).

PRACTICE TIP: The number of employee hours for federal FMLA leave eligibility is 1,250 hours worked, not paid. 29 [C.F.R.](#) §§ 825.110(a)(2), (c)(1). Also, the 12 months of employment that employees must work to be eligible for federal FMLA do not have to be consecutive (29 [C.F.R.](#) § 825.110(b)), unlike with WFMLA.

2. Fifty-two (52) consecutive weeks of employment need not immediately precede disputed action. *Butzlaff v. Personnel Comm'n*, 166 Wis. 2d 1028, 1036-37 (Ct. App. 1992).
3. Employees are covered regardless of federal immigration status. *Burlington Graphic Sys., Inc. v. DWD*, 2015 WI App 11, ¶ 13, 359 Wis. 2d 647.

D. Types of WFMLA Leave [§ 4.124]

1. Medical Leave for Employee's Own Serious Health Condition
 - a. Two weeks' unpaid WFMLA leave must be granted per calendar year for a serious health condition that renders an employee unable to perform duties, *see infra* § 4.8. [Wis. Stat.](#) § 103.10(4)(a).
 - b. At time leave is requested, employee does not need to establish existence of serious health condition and that leave is medically necessary; burden is on employer to request medical certification. *Sieger v. Wisconsin Pers. Comm'n*, 181 Wis. 2d 845, 859 (Ct. App. 1994).

NOTE: Although not part of the WFMLA, bone marrow and organ donation leave is another statutory medical leave in Wisconsin. [Wis. Stat.](#) § 103.11. It provides up to six weeks' unpaid leave in any 12-month period for bone marrow and organ donation. [Wis. Stat.](#) § 103.11(4), (5)(a). Leave may be taken only for the period necessary for the employee to undergo the bone marrow or organ donation procedure and to recover from the procedure. [Wis. Stat.](#) § 103.11(4). An employee on bone marrow and organ donation leave is entitled to be reinstated to an equivalent position and to continue group health insurance on the terms that existed before the leave. [Wis. Stat.](#) § 103.11(8), (9). Covered employers are private- and public-sector companies that employ at least 50 persons on a permanent basis. [Wis. Stat.](#) § 103.11(1)(c). To be eligible for leave, an employee must have been employed by the same employer for more than 52 consecutive weeks and have worked for the employer for at least 1,000 hours during the preceding 52-week period. [Wis. Stat.](#) § 103.11(2)(c). An eligible employee may substitute paid (e.g., sick pay or vacation) or unpaid employer-provided leave for unpaid bone marrow and organ donation leave. [Wis. Stat.](#) § 103.11(5)(b). An employee must make a reasonable effort to schedule the bone marrow or organ donation procedure so that it does not unduly disrupt the employer's operations, subject to the approval of the health-care provider of the bone marrow or organ donee, and provide advance notice to the employer in a reasonable and practical manner. [Wis. Stat.](#) § 103.11(6). An employer may require a medical certification that the donee has a serious health condition that necessitates a bone marrow or organ transplant, that the employee is eligible and has agreed to serve as a bone marrow or organ donor for the donee, and addressing the amount of time expected to be necessary for the employee to recover from the bone marrow or organ donation procedure. [Wis. Stat.](#) § 103.11(7).

- c. If employee takes medical leave, employee cannot extend leave by adding another type of leave provided by employer unless employee meets all requirements for taking the other leave that are in effect for all employees or obtains employer's consent. [Wis. Admin. Code](#) § DWD 225.031.
2. Leave for Birth, Adoption, or to Care for Family
- a. Six weeks' unpaid leave must be granted for childbirth or adoption (but not placement of a foster child), if leave is commenced within 16 weeks of birth or adoption placement or no later than 16 weeks after the actual date of birth. [Wis. Stat.](#) § 103.10(3)(a)1., (b); *see also* [Wis. Admin. Code](#) § DWD 225.02(6).
 - b. Any noncontinuous increment or each noncontinuous increment of 6-week family leave allowed for birth of child must begin within 16 weeks after birth. [Wis. Stat.](#) § 103.10(3)(a)1., (b)1.; *Schwedt v. Department of Indus., Lab. & Hum. Rels.*, 188 Wis. 2d 500, 506, 525 N.W.2d 130 (Ct. App. 1994). An employee is entitled to one 6-week leave per child. [Wis. Admin. Code](#) § DWD 225.02(7).
 - c. Two weeks' unpaid leave must be granted for the care of employee's child (including foster child), spouse, domestic partner with certain exceptions, parent, or parent-in-law having a serious health condition, *see infra* § 4.8. [Wis. Stat.](#) §§ 103.10(1)(a), (ar), (f), (h), (3)(a)2., (b)3.
 - (1) *Domestic partner (including qualifying family members) of public employee* means a registered domestic partner, provided the public employee filed an affidavit with the Department of Employee Trust Funds (ETF) not later than September 23, 2017, stating the relationship met the required statutory criteria. [Wis. Stat.](#) §§ 103.10(1)(ar), 40.02(21c), (21d).
 - (2) *Domestic partner (including qualifying family members) of private-sector employee* means a domestic partnership registered before April 1, 2018. Private-sector employers who wish to continue to provide WFMLA-like leave rights to unregistered domestic partners not meeting the statutory definition may continue do so. [Wis. Stat.](#) §§ 103.10(1)(ar), 770.01–10.
 - d. Employee is not entitled to more than 8 weeks' total family leave in any calendar year. [Wis. Stat.](#) § 103.10(3)(a)3; [Wis. Admin. Code](#) § DWD 225.01(1)(m).
 - e. If employee takes family leave, employee cannot extend leave by adding another type of leave provided by employer unless employee meets all requirements for taking the other leave that are in effect for all employees or obtains employer's consent. [Wis. Admin. Code](#) § DWD 225.031.

E. Leave and Employers' Notice Obligations [§ 4.125]

1. Employees

- a. Employees must give employers advance notice of WFMLA leave for expected birth or adoption placement in a reasonable and practicable manner. [Wis. Stat.](#) § 103.10(6)(a). They also must schedule leave after reasonably considering the employers' needs. [Wis. Stat.](#) § 103.10(3)(c); *see also* [Wis. Admin. Code](#) § DWD 225.02.

- b. In scheduling family caregiving leave, employees must reasonably consider the needs of employers by not unduly disrupting employers' operations, subject to health-care providers' approval, and giving advance notice in a reasonable and practicable manner. [Wis. Stat.](#) § 103.10(3)(c), (6)(b); *see also* [Wis. Admin. Code](#) § DWD 225.02.
 - c. Employees may schedule their own medical leave under the WFMLA as medically necessary. [Wis. Stat.](#) § 103.10(4)(c). For employees' own medical leave, employees must make reasonable efforts to schedule leaves so that they do not unduly disrupt employers' operations, subject to health-care providers' approval, and give advance notice in a reasonable and practicable manner. [Wis. Stat.](#) § 103.10(6)(b); *see also* [Wis. Admin. Code](#) DWD § 225.02.
2. Employers: Unlike with the federal FMLA (29 [C.F.R.](#) § 825.300), there are no notice obligations on employers regarding designation of absences as WFMLA leave.

F. Intermittent Leave [§ 4.126]

1. Employees may schedule family leave as partial or noncontinuous absences (i.e., in increments of less than a full workday) from employment (hereafter referred to as "intermittent leave"), if this is not unduly disruptive to employer's operations. [Wis. Stat.](#) § 103.10(3)(d); [Wis. Admin. Code](#) § DWD 225.02.
2. Employees may take medical leave as intermittent leave. [Wis. Admin. Code](#) § DWD 225.02.

G. Serious Health Condition [§ 4.127]

1. Threshold question regarding whether WFMLA applies is whether a serious health condition exists. Serious health condition requires a disabling physical or mental illness, injury, impairment, or condition, *and one of the following*:
 - a. Inpatient hospital care, or
 - b. Outpatient care requiring continuing treatment or supervision by health-care provider. [Wis. Stat.](#) § 103.10(1)(g).
2. Under the WFMLA, outpatient care requires two direct, continuous, and first-hand contacts by a health-care provider. *MPI Wis. Machining Div. v. Department of Indus., Lab. & Hum. Rels.*, 159 Wis. 2d 358, 372 (Ct. App. 1990) ("We conclude that the term 'continuing treatment or supervision by a health care provider' in the [W]FMLA contemplates direct, continuous and first-hand contact by a health care provider subsequent to the initial outpatient contact.")
3. Pregnancy is a serious health condition. *Haas v. Department of Indus., Lab. & Hum. Rels.*, 166 Wis. 2d 288, 296 (Ct. App. 1991) ("Ongoing pregnancy satisfies the definition of 'serious health condition' because it requires direct, continuous and first-hand contact by a physician; it is a physical condition requiring outpatient care both before and after birth.")

H. WFMLA Medical Certification [§ 4.128]

1. If employee takes medical leave or family leave to care for a family member, the employer may require employee to provide certification by health-care provider of the existence of serious health condition. [Wis. Stat.](#) § 103.10(7)(a), (b); [Wis. Admin. Code](#) § DWD 225.02(9).
2. Pursuant to [Wis. Stat.](#) § 103.10(7)(b), a medical certification under the WFMLA is required to state only:
 - a. That the child, spouse, domestic partner, parent, parent-in-law, or employee has a serious health condition;
 - b. The date the serious health condition commenced and its probable duration;
 - c. The medical facts regarding the serious health condition; and
 - d. If the employee requests medical leave, an explanation of the extent to which the employee is unable to perform his or her employment duties.
3. Employer may require second medical opinion chosen by and paid for by employer for any information in the medical certification. [Wis. Stat.](#) § 103.10(7)(c).

PRACTICE TIP: The definition of *serious health condition* under the WFMLA differs from the definition in the federal FMLA. An employer should not provide an employee the federal Department of Labor FMLA medical certification form for time off that will count only as WFMLA leave. The federal FMLA medical certification requests more information than is allowed under WFMLA. [Wis. Stat.](#) § 103.10(7)(b).

I. Reinstatement to Job [§ 4.129]

1. Upon return from family or medical leave, employees must be placed in their own position if that position is vacant; if it is not vacant, employees must be placed in an equivalent position. [Wis. Stat.](#) § 103.10(8)(a); *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 251 (1992). An “equivalent employment position means a position with equivalent compensation, benefits, working shift, hours of employment, job status, responsibility and authority.” *Kelley Co.*, 172 Wis. 2d at 253. The duties do not need to be the same but must be “equivalent in terms of significance to those performed prior to the leave.” *Id.*
2. Employees are not entitled to accrue seniority or benefits (e.g., vacation benefits) during WFMLA leave unless they substitute another type of leave that would otherwise entitle them to the accrual of such benefits. [Wis. Stat.](#) § 103.10(9)(a); [Wis. Admin. Code](#) § DWD 225.03(4); *Heibler v. DWD*, 2002 WI App 21, ¶ 12, 250 Wis. 2d 152.

J. Group Health Insurance During Leave [§ 4.130]

1. Employer must maintain, during employee’s leave, the same group health insurance coverage that applied immediately before leave began. [Wis. Stat.](#) § 103.10(9)(b).
2. If employee continues to make any required contribution, employer also must continue to make its group health insurance premium contribution; employee’s nonpayment into an escrow account for employee’s share of group health insurance premium contribution cannot be the basis for denial of leave under the WFMLA. [Wis. Stat.](#) § 103.10(9)(b); [Wis. Admin. Code](#) § DWD 225.04(1)–(3).

3. Employer may require employee to contribute up to eight weeks of employee's share of group health insurance premium into escrow account, with any unexpended amount to be returned to employee upon ending employment with employer. [Wis. Stat.](#) § 103.10(9)(c); [Wis. Admin. Code](#) § DWD 225.04(4).

K. Poster Requirements for Covered Employers [§ 4.131]

1. Employers must post notice, approved by Department of Workforce Development (DWD), setting forth employees' rights under the WFMLA. [Wis. Stat.](#) § 103.10(14).
2. Notice must be posted in a location where employee could reasonably expect it to be placed (e.g., in a place with which employee is familiar through long use and acquaintance). *In-Sink-Erator v. Department of Indus., Lab. & Hum. Rels.*, 200 Wis. 2d 770, 779 (Ct. App. 1996).
3. Forfeiture of \$100 per offense may be imposed for violation. [Wis. Stat.](#) § 103.10(14)(a).
4. Failure to post also tolls limitation period for filing of complaint by employee, *see infra* § 4.27, unless employer can show that employee had actual knowledge of the WFMLA. [Wis. Admin. Code](#) § DWD 225.05.

L. Non-WFMLA Leave Notice Requirement [§ 4.132]

Any person employing at least 25 individuals must post notice describing employer's policy on medical and family leave. [Wis. Stat.](#) § 103.10(14)(b).

M. Reduction or Denial of Other Benefits [§ 4.133]

Employer may not reduce or deny other benefits accruing before or after family or medical leave because employee received family or medical leave. [Wis. Stat.](#) § 103.10(8)(b).

N. Preemption [§ 4.134]

1. The Employee Retirement Security Act of 1974 (ERISA) does not preempt the substitution provision of the WFMLA. *Aurora Med. Grp. v. DWD*, 2000 WI 70, ¶ 37, 236 Wis. 2d 1 ("In summary, we conclude that Aurora has failed to establish that § 514(a) of ERISA pre-empts the Wisconsin FMLA substitution provision."). *But see Sherfel v. Gassman*, 899 F. Supp. 2d 676, 699 (S.D. Ohio 2012) ("The WFMLA substitution provision, which requires administrators to pay benefits to beneficiaries chosen by state law rather than to beneficiaries identified in the plan documents, 'implicates an area of core ERISA concern' and is pre-empted.").
2. Section 301 of the Labor Management Relations Act (LMRA) does not preempt the WFMLA. *Miller Brewing Co. v. Department of Indus., Lab. & Hum. Rels.*, 210 Wis. 2d 26, 42–44 (1997) (holding that Section 301 of the LMRA did not preempt a claim under the WFMLA challenging an employer's refusal to allow an employee to substitute her paid sick leave from a collective bargaining agreement for the six weeks of unpaid family leave); *Leher v. Consolidated Papers Co.*, 786 F. Supp. 1480, 1481 (W.D. Wis. 1992) (holding Section 301 of the LMRA does not preempt plaintiff's claim under the WFMLA seeking to use sick leave when on family leave because it did not require interpretation of the collective bargaining agreement and was not substantially dependent on the agreement).

II. SUBSTITUTION OF EMPLOYER-PROVIDED LEAVE FOR UNPAID WFMLA LEAVE [§ 4.135]**A. WFMLA Leave Is Unpaid [§ 4.136]**

Leave under WFMLA is unpaid. [Wis. Stat.](#) § 103.10(5)(a).

B. Substitution [§ 4.137]**1. Only Employees May Substitute Employer-Provided Leave**

To receive pay, employees may substitute any other type of employer-provided accrued paid or unpaid leave for unpaid WFMLA leave. [Wis. Stat.](#) § 103.10(5)(b); *Richland Sch. Dist. v. Department of Indus., Lab. & Hum. Rels.*, 174 Wis. 2d 878, 895–896 (1993) (“Only those types of leave which an employment contract allows an employe to accumulate over time are available for substitution.”); [Wis. Admin. Code](#) § DWD 225.03(1). If an employee has accrued, paid sick leave available, employee may elect to substitute that paid leave for WFMLA leave from the first day of leave, even if employer has a policy that paid sick leave does not kick in until several days after leave begins. [Wis. Admin. Code](#) § DWD 225.03(1); *Kraft Foods, Inc. v. DWD*, 2001 WI App 69, ¶¶ 19–20, 242 Wis. 2d 378.

2. Employers’ Substitution of Leave Is Prohibited

Employers cannot force employees to substitute any employer-provided paid or unpaid leave for unpaid WFMLA leave. [Wis. Admin. Code](#) § DWD 225.03(3); *Milwaukee Transp. Servs., Inc. v. DWD*, 2001 WI App 40, ¶10, 241 Wis. 2d 336 (holding employer may not require employee to take paid sick leave instead of unpaid medical leave under the WFMLA); *see also Heibler v. DWD*, 2002 WI App 21, ¶ 16, 250 Wis. 2d 152 (holding that union contract requiring employee to choose between vacation, which would entitle the employee to continue to accrue certain benefits during the leave, and sick leave, which would not entitle the employee to continue to accrue benefits, did not unlawfully interfere, restrain, or deny the employee’s WFMLA rights).

PRACTICE TIP: When concurrently running employees’ federal FMLA leave with WFMLA leave, employers must not require substitution before employees exhaust WFMLA leave. Doing so would violate the WFMLA’s prohibition of employer substitution of leave. After WFMLA leave is exhausted, employers may require substitution under the federal FMLA, but they must outline that in their policies and federal FMLA leave designation communications.

C. Employees May Substitute Only Accrued Leave [§ 4.138]

Leave is accrued under the WFMLA when it is specified and quantifiable, has a “draw-down” feature by which the amount of available leave decreases as the employees uses leave, and the amount of leave increases over time. *Kraft Foods v. DWD*, 2001 WI App 69, ¶ 12, 242 Wis. 2d 378.

PRACTICE TIP: Leave that is awarded in a single allotment or that is unlimited is not accrued under the WFMLA.

D. Deemer Clauses [§ 4.139]

1. If an employer grants employer-provided leave for a reason and manner that is “no more restrictive” than leave provided by the WFMLA, then such employer-provided leave shall be “deemed” to be WFMLA leave. [Wis. Admin. Code](#) § DWD 225.01(6) (leave for birth of the employee’s natural child), (7) (leave for placement of child for adoption), (8) (leave to care for employee’s child, spouse, parent, or parent-in-law), (9) (leave for employee’s own health), (10) (“deemer clauses.”). If the leave provided by an employer does not have as liberal a substitution provision as found in WFMLA, then the leave is “more restrictive.” *Lawless v. University of Wisconsin-Madison*, No. 90-0023-PC-ER (Wis. Pers. Comm’n June 1, 1990), <http://pcm.state.wi.us/pdfdecisions/90-0023-PC-ER-B.pdf>.
2. Employers’ counting employer-provided leave that is more restrictive than WFMLA leave as WFMLA leave violates the WFMLA. See [Wis. Stat.](#) § 103.10(11)(a); [Wis. Admin. Code](#) §§ DWD 225.01(6)–(9), DWD 225.03(3).

III. PROHIBITED ACTS [§ 4.140]

A. Interference with, Restraint of, or Denial of the Exercise of Any Rights Under the WFMLA [§ 4.141]

See generally [Wis. Stat.](#) § 103.10(11)(a).

B. Discharge or Discrimination [§ 4.142]

1. Unlawful to interfere with, restrain, or deny the exercise of any right afforded employees under the WFMLA. [Wis. Stat.](#) § 103.10(11)(a).
2. Unlawful to discharge or discriminate against employee for opposing a practice made unlawful under the WFMLA. [Wis. Stat.](#) § 103.10(11)(b).
3. Retaliation against an employee who attempts to enforce a right under the WFMLA is prohibited. [Wis. Stat.](#) § 111.322(2m)(a)–(d).

IV. ADMINISTRATIVE ENFORCEMENT [§ 4.143]

A. Preparing Complaint [§ 4.144]

1. Under [Wis. Admin. Code](#) § DWD 225.06(3), the complaint must:
 - a. Contain full name and address of each complainant and respondent and facts constituting alleged prohibited action, including date of each occurrence.
 - b. Be on form promulgated by the DWD’s Equal Rights Division (ERD) or other form acceptable to the ERD.
 - c. Be signed by complainant or representative.
2. Complaint forms are available at <https://dwd.wisconsin.gov/dwd/forms/erd/erd-8994-e.htm> (last visited May 5, 2022).

B. Filing Complaint [§ 4.145]

File complaint with the ERD in person, by mail, or by fax at either 201 E. Washington Ave., Madison, WI 53702, fax number (608) 267-4592, or 819 N. 6th St., Milwaukee, WI 53203, fax number (414) 227-4084. [Wis. Admin. Code](#) § DWD 225.06(2).

C. Time Limits [§ 4.146]

1. Employee must file complaint within 30 days after violation of WFMLA occurred or employee should reasonably have known that violation occurred. [Wis. Stat.](#) § 103.10(12); *Jicha v. Department of Indus., Lab. & Hum. Rels.*, 169 Wis. 2d 284, 295 (1992).
2. Statute of limitation may be tolled if employer failed to post notice, *see supra* § 4.12. [Wis. Admin. Code](#) § DWD 225.05.

D. Preliminary Review of Complaint [§ 4.147]

1. Under [Wis. Admin. Code](#) § DWD 225.09(1), complaint is reviewed for
 - a. Whether complainant is protected,
 - b. Whether respondent is covered,
 - c. Whether claim for relief is stated, and
 - d. Whether complaint was filed within appropriate time limits.
2. If any requirement is not met
 - a. All parties are served with determination and order dismissing complaint. [Wis. Admin. Code](#) § DWD 225.09(2).
 - b. Order dismissing complaint may be appealed by filing written request with division administrator. [Wis. Admin. Code](#) § DWD 225.09(3).
 - (1) Appeal must be filed within 10 days after date of the order.
 - (2) Request must state grounds of appeal.
3. On appeal, matter is referred to hearing section for review by administrative law judge (ALJ), who may affirm, reverse, modify, or set aside. [Wis. Admin. Code](#) § DWD 225.09(3).
 - a. If determination is reversed or set aside, complaint is referred for investigation. *Id.*; *see also infra* § 4.31.
 - b. If determination is affirmed, decision is subject to judicial review. [Wis. Admin. Code](#) § DWD 225.09(2).

E. Amending or Withdrawing Complaint [§ 4.148]

1. Complaint may be withdrawn by written request at any time. [Wis. Admin. Code](#) § DWD 225.06(6).
 - a. Request must be signed by complainant or complainant's duly authorized representative.
 - b. Order of dismissal is issued with prejudice unless otherwise expressly stated.
2. Complaint may be amended before issuance of initial determination. [Wis. Admin. Code](#) § DWD 225.06(5).
3. After initial determination is issued, *see infra* § 4.32, complainant may amend, subject to approval by ALJ; amendments may be allowed only to make claims that relate back to original complaint for statute-of-limitation purposes. [Wis. Admin. Code](#) § DWD 225.06(5).

F. Service and Response [§ 4.149]

1. Complaint is served on respondent before investigation. [Wis. Admin. Code](#) § DWD 225.08(1).
2. Respondent is simultaneously served with request for response to be made within a time period specified by the DWD. [Wis. Admin. Code](#) § DWD 225.08(2).

G. Investigation [§ 4.150]

1. Complaint investigated. [Wis. Admin. Code](#) § DWD 225.10.
2. Subpoena powers available. [Wis. Admin. Code](#) § DWD 225.10(1).
3. The ERD may advise complainant to amend charge if it appears respondent may have committed a prohibited act that is not alleged in complaint. [Wis. Admin. Code](#) § DWD 225.10(2).
4. Conciliation may be attempted concurrent with investigation. [Wis. Stat.](#) § 103.10(12)(a); [Wis. Admin. Code](#) § DWD 225.13.

H. Initial Determination as to Cause [§ 4.151]

1. After investigation, the ERD issues written initial determination as to probable cause. [Wis. Admin. Code](#) § DWD 225.11(1).
2. If no probable cause is found after investigation, complainant may request hearing on issue of probable cause. [Wis. Admin. Code](#) § DWD 225.12(1).
 - a. Request must be filed within 10 days after initial determination. *Id.*
 - b. Parties may stipulate before hearing that ALJ may decide case on merits rather than determine the issue of probable cause. [Wis. Admin. Code](#) § DWD 225.12(3).

- c. Hearing on probable cause conducted. See [Wis. Admin. Code](#) § DWD 225.12; see also *infra* §§ 4.33, .36, .37.
 - (1) Finding of no probable cause, by ALJ following hearing, is a final order of the DWD appealable to the circuit court. [Wis. Admin. Code](#) § DWD 225.24(2).
 - (2) If ALJ finds probable cause at hearing, ALJ orders that the case be certified for a hearing on the merits. *Id.*
3. If complainant is state employee, the Wisconsin Employment Relations Commission will, at complainant's request, waive investigation and determination of probable cause and proceed to hearing on complaint. [Wis. Stat.](#) § 230.45(1m).

I. Notice of Hearing [§ 4.152]

1. Under [Wis. Admin. Code](#) § DWD 225.15(1), content of notice includes
 - a. Parties' identities and case number;
 - b. Statement of legal authority and nature of alleged violation; and
 - c. Time, date, and place of hearing.
2. Under [Wis. Admin. Code](#) § DWD 225.15(2), hearing to be held in
 - a. County where respondent resides,
 - b. County where prohibited act occurred, or
 - c. Another location with the consent of the parties.

J. Answer [§ 4.153]

1. [Wis. Admin. Code](#) § DWD 225.16(1) requires
 - a. Answer must be filed by respondent within 10 days after date of notice of hearing on merits, and
 - b. Respondent must serve copies on all other parties.
2. Content of answer. [Wis. Admin. Code](#) § DWD 225.16(2).
 - a. Must contain specific admission, denial, or explanation of each allegation, and, if respondent is without knowledge or information sufficient to admit or deny, statement to that effect.
 - b. Any allegation not responded to is deemed admitted.
 - c. Failure to raise affirmative defenses may constitute waiver unless good cause is shown.

K. Discovery [§ 4.154]

1. Discovery is allowed as provided in [Wis. Stat.](#) ch. 804. [Wis. Admin. Code](#) § DWD 225.18(3).
2. Discovery against unrepresented party is permitted only after written notice of intent to take discovery is sent to the unrepresented party and to the chief of the hearing section or the ALJ, if one has been designated. [Wis. Admin. Code](#) § DWD 225.18(2).
3. All copies of discovery requests and notices of deposition sent to an unrepresented party must also be sent to the DWD. *Id.*
4. Discovery commences only after certification to hearing, except as provided under [Wis. Stat.](#) § 227.45(7). [Wis. Admin. Code](#) § DWD 225.18(1).
5. Copies of responses to discovery made by an unrepresented party must be sent to the DWD by the party that sought the discovery. *Id.*

L. Miscellaneous Hearing Provisions [§ 4.155]

1. Witness and exhibit lists. [Wis. Admin. Code](#) § DWD 225.21.
 - a. File and exchange written lists of witnesses and copies of exhibits no later than 10 days before date of hearing.
 - b. Failure to exchange may trigger exclusion.
2. Subpoenas are served and enforced as in other civil litigation. [Wis. Admin. Code](#) § DWD 225.19(1).
3. Witness fees are paid as in other civil litigation. *Id.*
4. Reasonable attorney fees awarded at ALJ's discretion. [Wis. Stat.](#) § 103.10(12)(d).
5. Motions. [Wis. Admin. Code](#) § DWD 225.19(2).
 - a. File prehearing motions with the ERD's hearing section and serve on all parties.
 - b. Motions decided without oral argument unless requested by ALJ.
6. Prehearing conference may be held under [Wis. Stat.](#) § 227.44(4). [Wis. Admin. Code](#) § DWD 225.17.
7. Disqualification of ALJ. [Wis. Admin. Code](#) § DWD 225.20.
 - a. File a timely and sufficient affidavit requesting disqualification.
 - b. ALJ decides whether he or she should be disqualified.
 - c. Grounds are personal bias or some other reason.

M. Hearing Procedure [§ 4.156]

1. Hearing conducted in accordance with [Wis. Stat.](#) ch. 227. [Wis. Stat.](#) § 103.10(12)(b); [Wis. Admin. Code](#) § DWD 225.22(1).
 - a. ALJ presides. [Wis. Stat.](#) § 227.46(1).
 - b. Witnesses are sworn and testify on oath. [Wis. Stat.](#) § 227.46(1)(a).
 - c. All witnesses are subject to cross-examination. [Wis. Stat.](#) § 227.45(6).
 - d. Rebuttal evidence is allowed. [Wis. Stat.](#) § 227.44(3).
 - e. Documents are marked and entered into record. [Wis. Stat.](#) § 227.45(2).
 - f. Objections. [Wis. Stat.](#) §§ 227.45(1), 227.46(1).
 - (1) May be made to questions, testimony, and offered exhibits. [Wis. Stat.](#) § 227.45(1).
 - (2) Objections to be noted in record. *Id.*
 - (3) Argument on objections allowed at ALJ's discretion. [Wis. Stat.](#) § 227.46(1).
2. Requests for postponement. [Wis. Admin. Code](#) § DWD 225.22(2).
 - a. Must be filed within 10 days after notice of hearing, and
 - b. Are only granted for good cause.
3. Hearing record
 - a. Either party may, at its own expense, have a court reporter present at the hearing to transcribe the proceedings or may request and pay a fee for a recorded transcript from the ERD. [Wis. Admin. Code](#) § DWD 225.23(1), (3).
 - b. Exceptions. [Wis. Admin. Code](#) § DWD 225.23(3).
 - (1) If transcript is prepared for judicial review, it is prepared at the ERD's expense.
 - (2) Free copy of transcript for other purposes available if the standard of indigency is met; must file affidavit of indigency.
4. Independent medical examination. [Wis. Stat.](#) § 103.10(12)(c).
 - a. If two or more health-care providers disagree under certification provisions, *see supra* § 4.9, the DWD may appoint another.
 - b. Employer and employee each pay 50% of the cost of the examination and opinion.

5. Decision and order. *See generally* [Wis. Admin. Code](#) § DWD 225.24(1).
 - a. Issued within 30 days after hearing. [Wis. Stat.](#) § 103.10(12)(d).
 - b. Under [Wis. Admin. Code](#) § DWD 225.24(1), decision and order include:
 - (1) Findings of fact,
 - (2) Conclusions of law, and
 - (3) Order.
 - c. Memorandum opinion is optional. *Id.*
 - d. Decision of ALJ, either on probable cause issue or on the merits, is final. [Wis. Admin. Code](#) § DWD 225.24(2), (3).
 - e. Review is in circuit court under [Wis. Stat.](#) § 227.52.
 - f. Order must contain separate notice advising of right to judicial review. [Wis. Admin. Code](#) § DWD 225.25(2).
6. Available remedies. [Wis. Stat.](#) § 103.10(12)(d).
 - a. Order that employer provide requested family or medical leave
 - b. Reinstatement
 - c. Back pay accrued not more than two years before filing complaint
 - d. Reasonable, actual attorney fees to complainant
 - e. Interest on award at annual rate of 12% simple interest, computed by calendar quarter. [Wis. Admin. Code](#) § DWD 225.24(4).

N. Rehearing [§ 4.157]

1. Petition. [Wis. Stat.](#) § 227.49(1).
 - a. Written petition must specify, in detail, grounds for relief sought and supporting authority.
 - b. Petition must be filed within 20 days after service of order and served on all parties.
 - c. Petition not prerequisite for appeal or review.
 - d. Petition does not suspend or delay effective date of order. [Wis. Stat.](#) § 227.49(2).
2. Grounds

- a. Material error of law. [Wis. Stat.](#) § 227.49(3)(a).
 - b. Material error of fact. [Wis. Stat.](#) § 227.49(3)(b).
 - c. Newly discovered material evidence that could not have been discovered previously with diligence. [Wis. Stat.](#) § 227.49(3)(c).
3. Action on petition
- a. Agency may order rehearing or enter an order on petition and shall dispose of petition within 30 days after petition is filed. [Wis. Stat.](#) § 227.49(5).
 - b. If petition is not disposed of in 30 days, petition is deemed denied. [Wis. Stat.](#) § 227.49(5)
 - c. If petition is granted, agency must schedule rehearing as soon as practicable. [Wis. Stat.](#) § 227.49(6).
4. Hearing procedure is same as for initial hearing unless otherwise ordered. *Id.*; *see also supra* § 4.37.
5. Decision. [Wis. Stat.](#) § 227.49(6).
- a. Agency may change original order if order is unlawful or unreasonable.
 - b. Decision and order following rehearing have same effect as original decision and order.

V. JUDICIAL REVIEW [§ 4.158]

A. Matters Reviewable [§ 4.159]

Findings and orders of Labor and Industry Review Commission (LIRC). [Wis. Stat.](#) § 111.395.

B. Procedure [§ 4.160]

1. Commencing review. [Wis. Stat.](#) § 227.53(1)(a)1.
 - a. Serve petition personally or by certified mail on affected agency.
 - b. File petition with clerk of circuit court in county where review is to be held.
2. Review to be commenced by petitioner within 30 days after service of agency decision. [Wis. Stat.](#) § 227.53(1)(a)2.
3. Venue. [Wis. Stat.](#) § 227.53(1)(a)3.
 - a. In county where petitioner resides
 - b. Exceptions

- (1) If petitioner is agency, where respondent resides
- (2) If petitioner is not a state resident, in county where property affected by decision is located or, if no property affected, in county where dispute arose
- (3) If multiple petitions filed:
 - (a) First petition determines venue
 - (b) Court may grant transfer or consolidation if appropriate:
 - (i) Transfer if parties stipulate, and
 - (ii) Court to which transfer sought agrees.
4. Contents of petition. [Wis. Stat.](#) § 227.53(1)(b).
 - a. Caption (petitioner: person seeking review; respondent: agency whose decision is to be reviewed)
 - b. Nature of petitioner's interest
 - c. Facts showing how petitioner was aggrieved by decision
 - d. Applicable grounds specified in [Wis. Stat.](#) § 227.57
5. Amendment with court's permission. [Wis. Stat.](#) § 227.53(1)(b).
6. Service. [Wis. Stat.](#) § 227.53(1)(c).
 - a. Serve each party or attorney of record personally or by certified mail or, when service is timely admitted in writing, by first-class mail.
 - b. Serve not later than 30 days after commencement of action for review.
7. Notice of appearance and statement of position. [Wis. Stat.](#) § 227.53(2).
 - a. Serve on petitioner, respondent, and attorney general within 20 days after service of petition.
 - b. File with clerk of court, together with proof of service, within 10 days after service on petitioner, respondent, and attorney general.
8. Enforcement of agency decision is not stayed automatically but, rather, is stayed at discretion of reviewing court. [Wis. Stat.](#) § 227.54.
9. Record. [Wis. Stat.](#) § 227.55.
 - a. Agency to transmit record within 30 days after service of petition for review.

- b. Record may be shortened by stipulation of all parties.
- c. Any party, other than agency, refusing to stipulate may be taxed by court for additional cost.

10. Method of review

- a. Additional evidence. [Wis. Stat.](#) § 227.56(1).
 - (1) Before trial date, a party may apply to court for permission to present additional evidence.
 - (2) Must show that
 - (a) Additional evidence is material, and
 - (b) Good reasons exist for failure to present this evidence in prior proceedings.
 - (3) Additional evidence taken before the ERD
 - (a) Agency may modify findings and decision based on additional evidence.
 - (b) Agency files any modified decision or order and additional evidence with court.
- b. Motion to dismiss. [Wis. Stat.](#) § 227.56(3).
 - (1) May be filed within 20 days after time specified in [Wis. Stat.](#) § 227.53 for filing notice of appearance.
 - (2) After hearing on motion, permission to amend petition may be granted.
- c. Proceedings may be brought for hearing or trial on not less than 10 days' notice after expiration of time for service of notice of appearance. [Wis. Stat.](#) § 227.56(2).

11. Scope of review and decision

- a. Review confined to record, except testimony is allowed if irregularities in procedure are alleged. [Wis. Stat.](#) § 227.57(1).
- b. Court must affirm decision unless error is established. [Wis. Stat.](#) § 227.57(2).
- c. Court must treat disputed issues of procedure, law, fact, or policy separately. [Wis. Stat.](#) § 227.57(3).
- d. Court must remand if it finds that a material error in procedure or a failure to follow procedure affected fairness or correctness of agency action or proceedings. [Wis. Stat.](#) § 227.57(4).
- e. Court must set aside or modify agency action, or remand for proceedings under correct interpretation of law, if

- (1) Erroneous interpretation of law, and
 - (2) Correct interpretation compels different decision. [Wis. Stat.](#) § 227.57(5); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 11, 302 Wis. 2d 496.
- f. Questions of law are reviewed de novo. *Tetra Tech*, 2018 WI 75, ¶ 84, 302 Wis. 2d 496.
 - g. If action is based on facts determined without hearing, court may set aside, modify, remand to agency, or order agency action if facts compel particular action as matter of law. [Wis. Stat.](#) § 227.57(7).
 - h. Court must reverse or remand if agency improperly exercised discretion, but court is not to substitute its own judgment on issue of discretion. [Wis. Stat.](#) § 227.57(8).
 - i. Court gives “due weight” consideration to the experience, technical competence, and specialized knowledge underlying an administrative agency’s determination, but only as a matter of persuasion, not deference. Court does not defer to agency’s conclusions of law. *Tetra Tech*, 2018 WI 75, ¶ 108, 302 Wis. 2d 496.
 - j. Decision on review must provide appropriate relief, irrespective of the original form of the petition, as well as necessary interlocutory orders to preserve interests of parties or public. [Wis. Stat.](#) § 227.57(9).

C. Appeal [§ 4.161]

See [Wis. Stat.](#) § 227.58.

1. Any party may appeal final judgment of circuit court within time specified in [Wis. Stat.](#) § 808.04(1).
2. Appeal procedure set forth in [Wis. Stat.](#) ch. 808.

VI. CIVIL ACTION [§ 4.162]

A. Availability [§ 4.163]

May be brought in circuit court by an employee or the DWD after completion of an administrative proceeding, including judicial review, of the same violation. [Wis. Stat.](#) § 103.10(13)(a).

B. Exhaustion Requirements [§ 4.164]

Complainant must first successfully complete all administrative proceedings, including judicial review. [Wis. Stat.](#) § 103.10(13)(a); *Butzlaff v. Department of Health & Fam. Servs.*, 223 Wis. 2d 673, 690 (Ct. App. 1998); *see also supra* §§ 4.40–42.

C. Time Limits [§ 4.165]

Action must be commenced within the later of

1. 60 days after completion of administrative proceedings, including review, or when no party seeks judicial review, 60 days after the date the 30-day period ends to file an action. [Wis. Stat.](#) § 103.10(13)(b)1.; *Hoague v. Kraft Foods Glob., Inc.*, 2012 WI App 130, 344 Wis. 2d 749; *see also supra* §§ 4.40–42.
2. 12 months after the violation occurred or 12 months after the DWD or employee should reasonably have known of violation. [Wis. Stat.](#) § 103.10(13)(b)2.; *cf. supra* § 4.27.

D. Remedy [§ 4.166]

Recovery for damages caused by violation is allowed only by those complainants successful at administrative level, including judicial review. [Wis. Stat.](#) § 103.10(13); *Butzlaff v. Department of Health & Fam. Servs.*, 223 Wis. 2d 673 (Ct. App. 1998); *see also supra* §§ 4.40–42.

E. No Jury Trial [§ 4.167]

No right to a jury trial in circuit court. *Harvot v. Solo Cup Co.*, 2009 WI 85, 320 Wis. 2d 1.

Chapter 5

Immigration Law

Benjamin T. Kurten

Reinhart Boerner Van Deuren s.c.
Milwaukee

NOTE: Unless otherwise indicated, all references in this chapter to the United States Code (U.S.C.) are current through Pub. L. No. 117-111 (Apr. 13, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 22,428 (Apr. 14, 2022).

I. INTRODUCTION [§ 5.168]

A. In General [§ 5.169]

1. Jurisdiction
 - a. Immigration law is federal law. The major relevant immigration laws include the following: Immigration and Nationality Act (INA); Immigration Reform and Control Act (IRCA); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208; American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L. No. 105-277; American Competitiveness in the Twenty-first Century Act of 2000 (AC 21), Pub. L. No. 106-313; Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. No. 106-553; LIFE Act

Amendments of 2000, Pub. L. No. 106-554; Homeland Security Act of 2002, Pub. L. No. 107-296; REAL ID Act of 2005, Pub. L. No. 109-13.

- b. Individual state agencies have been delegated roles in the seasonal worker (H-2A and H-2B) processes, *see infra* §§ [5.17–19](#), [5.43](#), [5.45](#).

2. Agencies involved

- a. U.S. Department of Homeland Security (DHS)
 - (1) U.S. Citizenship and Immigration Services (CIS)
Nebraska Service Center
850 S St.
Lincoln, NE 68501
(Regional Service Center)
 - (2) U.S. Citizenship and Immigration Services (CIS)
Milwaukee Field Office
310 E. Knapp St.
Milwaukee, WI 53202
(Local office)
 - (3) U.S. Citizenship and Immigration Service (CIS)
Chicago Field Office
101 W. Ida B. Wells Dr.
Chicago, IL 60605
(Regional Office)
 - (4) U.S. Immigration and Customs Enforcement (ICE)
SAC Chicago
101 W. Ida B. Wells Dr.
Chicago, IL 60605
(Regional Office – Homeland Security Investigations)
 - (5) U.S. Customs and Border Protection (CBP)
Service Port–Milwaukee
4915 S. Howell Ave., Ste. 200
Milwaukee, WI 53207
 - (6) Asylum Office
181 W. Madison St., Unit 3000
Chicago, IL 60602
- b. U.S. Department of Justice (DOJ)
 - (1) Chicago Immigration Court
525 W. Van Buren St., Ste. 500
Chicago, IL 60607
(Regional Immigration Court)

- (2) Office of the Chief Immigration Judge
5107 Leesburg Pike, Ste. 2400
Falls Church, VA 22041

 - c. U.S. Department of Labor (DOL)
Employment and Training Administration (ETA)
230 S. Dearborn St., 6th Fl.
Chicago, IL 60604

 - d. U.S. Department of State (DOS)
National Visa Center
31 Rochester Ave.
Portsmouth, NH 03801-2909

 - e. State of Wisconsin
Department of Workforce Development (DWD)
Bureau of Migrant Labor Services (BMRLS)
Foreign Labor Certification Program
201 E. Washington Ave., Rm. G100
Madison, WI 53702
3. Definitions
- a. *Alien*—Person who is not a citizen or national of U.S. 8 [U.S.C.](#) § 1101(a)(3).

 - b. *Immigrant*—Alien who does not qualify as a nonimmigrant is assumed to be an immigrant. Intends to reside permanently in U.S., *see infra* §§ [5.25–33](#). 8 [U.S.C.](#) § 1101(a)(15).

 - c. *Nonimmigrant*—Alien who qualifies for one of temporary (nonimmigrant) visa categories that limits alien’s time and activities authorized in U.S., *see infra* §§ [5.4–9](#).

 - d. *Visa*—A nonimmigrant visa issued by U.S. government affixed to the passport or other travel document signifies that a consular officer believes the alien to whom the visa was issued is eligible to apply for admission in a particular nonimmigrant category. Initial issuance can only be by U.S. consular officer outside U.S. Visa does not guarantee admission to U.S. An immigration inspector can deny entry if he or she believes that a particular alien is not eligible to be admitted in the category for which the visa was issued. Visas are issued on the basis of reciprocity with respect to both validity and number of entries permitted with the particular visa. Period of validity of a particular visa establishes the time during which the alien may present himself or herself at U.S. port of entry. Visas may be valid for as few as 30 days or up to 10 years; visas may be limited to a single entry or may be valid for multiple entries during the period of their validity. “Period of validity” of a visa is not the same as the “authorized period of temporary stay” in U.S. Authorized period of temporary stay, which is indicated on a small white or green card—Form I-94, Admission/Departure Record—stapled into the passport, may be less than the period of validity of the visa or may be much longer than the period during which the visa itself is valid. It is important to understand that it is always Form I-94, and not the visa in the passport, that determines a nonimmigrant alien’s status and its validity as to time and purpose. An alien is not out of status if he or she was properly admitted pursuant to a valid visa and the visa has expired, provided the person is still within the authorized period of stay indicated on Form I-94. 22 [C.F.R.](#) § 41.2(i); 22 [C.F.R.](#) § 41.111

- e. *Lawful Permanent Resident/Legal Permanent Resident*—Status of having been lawfully accorded the privilege of residing permanently in U.S. as an immigrant in accordance with the immigration laws. Lawful permanent residents are often referred to as “green card holders” because one version of the former government document that served as proof of lawful permanent resident status was primarily green in color. Most earlier versions of the card actually were more blue than green. The current version of the card, Alien Registration Receipt Card (Registered Alien Card) I-551, is a sophisticated personal identification document that contains holograms and other embedded security measures. Alien Registration Receipt Cards are valid for 2 years from the date of admission for “conditional” permanent residents and 10 years from issuance for all other lawful permanent residents. 8 [U.S.C.](#) § 1101(a)(20).
- f. *Prevailing wage*—Average wage rate paid to workers similarly employed in area of intended employment, as determined by authoritative wage survey, union contract, or other authorized method. 20 [C.F.R.](#) § 656.40.
- g. *Asylee/refugee*—Person unable or unwilling to stay in his or her country of nationality or the country in which he or she last habitually resided because of past persecution or well-founded fear of future persecution on account of race, religion, nationality, membership in particular social group, or political opinion, *see infra* §§ [5.47–48](#). 8 [U.S.C.](#) § 1101(a)(42).
- h. *Admission*—Lawful entry into U.S. after inspection and authorization by an immigration officer. When an alien arrives in the U.S., an immigration inspector at the port of entry must inspect him or her. If the person is admitted as a nonimmigrant, the alien’s entry is limited to a specific time period during which he or she is authorized to stay only to carry out a specific purpose (e.g., to visit for business or pleasure, to attend school, or to work for a specific employer). The immigration officer at the port of entry determines the period for which a nonimmigrant is admitted, even though the nonimmigrant visa issued by the consular officer may be valid for a longer or shorter time. The period of admission granted by the officer at the port of entry is noted on Form I-94, Admission/Departure Record. If an individual is admitted as an immigrant, there is no time limit imposed on his or her stay. 8 [U.S.C.](#) § 1101(a)(13).
- i. *Removal*—Process by which government seeks to remove from U.S. an alien who was denied admission upon arrival at U.S. border or who is already within U.S. by order of an immigration judge or by one of several nonjudicial streamlined processes, *see infra* §§ [5.52–57](#).
- j. *Inadmissible*—Not eligible to enter U.S.
- k. *Immediate Relative*—Children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens must be at least 21 years of age. For immigration law purposes, a *child* generally means an unmarried person under 21 years of age. 8 [U.S.C.](#) § 1151(b)(2)(A)(i)(f); 8 [U.S.C.](#) § 1101(b)(1).
- l. *Petitioner*
 - (1) Family relationship: U.S. citizen or permanent resident through whom alien is eligible for permanent residence by reason of qualifying family relationship.

- (2) Employment purposes: Prospective or current employer who files permanent or temporary visa petition on alien's behalf.

4. Practice tips

- a. Individual circumstances may require different strategies, even when the same type of visa or benefit is being pursued (e.g., in pursuing permanent residence based on employment, alien's education, training, and experience will influence category in which alien qualifies for visa and how case should be presented to CIS).
- b. Initial filing must be as complete and accurate as possible; once agency receives file, a record is established that may influence later filings for the same person or family members.
- c. Applying for certain visas may affect eligibility to change status to another visa or to apply for permanent residence; to avoid such problems, attorney should review regulations before advising client on applying for visa or changing status.
- d. Only U.S. citizens have the "right" to enter U.S.; the fact that alien has a visa or valid basis to have a visa issued does not grant alien any constitutional right to enter (for alien arriving from abroad, final decision regarding entry into U.S. is made at port of entry by DHS, not by U.S. consulate abroad).
- e. Some immigrant and nonimmigrant visas or statuses are limited on numerical basis; therefore, there may be backlog and substantial waiting period to obtain an immigration benefit.
- f. Pursuing case may require knowledge of CIS, DOL, and DOS regulations and statutes, Board of Immigration Appeals (BIA) decisions and policy memoranda, Board of Alien Labor Certification Appeals (BALCA) decisions, CIS Operations Instructions, DOS Foreign Affairs Manual, and federal court precedent.

B. Resources [§ 5.170]

1. *Federal Immigration Laws and Regulations* (annual code publication)
2. Austin T. Fragomen et al., *Immigration Procedures Handbook* (annual publication)
3. Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* (annual publication)
4. *Interpreter Releases* (periodical)
5. *Immigration Daily* (daily electronic update from ILW.com)
6. *Visa Bulletin* (DOS, Bureau of Consular Affairs), monthly publication; subscribe by writing to:

Visa Bulletin
Visa Office
U.S. Dep't of State
Washington, D.C. 20522-0106

To access online:

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> (last visited Apr. 12, 2022)

(email subscriptions available)

7. CIS:

<https://www.uscis.gov/> (last visited Apr. 12, 2022)

8. ICE:

<https://www.ice.gov/> (last visited Apr. 12, 2022)

9. ETA Foreign Labor Certification:

<https://www.dol.gov/agencies/eta/foreign-labor> (last visited Apr. 12, 2022)

10. CBP:

<https://www.cbp.gov/> (last visited Apr. 16, 2021)

11. DOS Visa Section:

<https://travel.state.gov/content/travel/en/us-visas.html> (last visited Apr. 12, 2022)

II. NONIMMIGRANT VISA/STATUS CATEGORIES OVERVIEW (TEMPORARY VISAS/NONIMMIGRANT STATUSES) [§ 5.171]

A. In General [§ 5.172]

1. Temporary visas/nonimmigrant statuses are generally issued for a defined period, from a few weeks to several years depending on visa type, and only allow alien to engage in certain activities within U.S.
2. Temporary visas are usually obtained overseas at U.S. embassy or consulate before alien departs for U.S.
3. Certain visas/nonimmigrant-status categories allow for extensions or permit alien to change to another category once alien is in U.S. and before period of alien's admission expires.
4. Temporary visas/nonimmigrant statuses are often referred to by letter and number designations (e.g., B-1, H-2A, etc.); these designations are discussed below.
5. See section [5.6](#), *infra*, for application process.

B. Nonimmigrant Visas [§ 5.173]

See also *supra* § [5.5](#), *infra* §§ [5.7–9](#), [5.15–24](#)

1. Generally, application for visa is made at U.S. consulate or embassy; procedures and requirements are subject to local variations. DOS Form DS-160.
2. The process of obtaining a visa from a U.S. consulate or embassy has become more complex and time consuming since the incidents of September 11, 2001 (9/11). The current requirements have led to occasional additional delays and increased processing times associated with applying for a visa overseas, as well as increased scrutiny of each visa application.
 - a. Most first-time nonimmigrant visa applicants who are between the ages of 14 and 79 must schedule and attend a face-to-face visa application interview and provide their biometric data (e.g., fingerprints, photo, signature) before a new visa may be issued.
 - b. Visa applicants who are applying to renew a visa that has not yet expired or has expired recently (varies by post and visa types, but generally, expiration must have been within past 12–48 months) may be eligible for a new streamlined visa application procedure in which the in-person interview requirement is waived.
 - c. Individuals who have applied for and been refused visa issuance while outside U.S. are prohibited from returning to U.S., even if they are in possession of a valid I-94 card.
 - d. Individuals traveling to Canada or Mexico who are not citizens or nationals of North Korea, Syria, Libya, Cuba, Sudan, or Iran may still reenter U.S. after a trip of 30 days or less with only a valid I-94 card provided that they have not also applied for and been refused a visa while outside U.S. 22 [C.F.R.](#) § 41.112(d); 8 [C.F.R.](#) § 214.1(b).
 - e. Individuals who have ever been out of status in the U.S. because they have overstayed a period of admission as indicated on an I-94 and who are not nationals of Canada or Mexico are not eligible to apply for a visa in Canada or Mexico. Such individuals may only apply for a new visa in their home country (i.e., country of nationality). *See* 22 [C.F.R.](#) § 41.101(b).
 - f. Even if CIS has approved a petition to give an alien a nonimmigrant status in U.S., if alien is outside of U.S. or if alien leaves U.S. after the alien's nonimmigrant petition was approved, to enter or reenter the U.S. the alien must have a valid visa for the approved nonimmigrant category in alien's passport unless he or she is specifically exempt from the visa requirements (e.g., Canadian citizens). The valid visa requirement also applies to all of the alien's dependents who may hold a derivative nonimmigrant status.

C. Most Common Categories [§ 5.174]

1. Temporary visitor. *See* 8 [U.S.C.](#) § 1101(a)(15)(B).
 - a. B-1, Visitor for business.
 - b. B-2, Visitor for pleasure.
2. Student in academic or language program. *See* 8 [U.S.C.](#) § 1101(a)(15)(F). Student will generally seek to obtain a degree from the program.

- a. F-1, Student.
 - b. F-2, Spouse or child of person with F-1 visa.
 - c. F-3, Border commuter student.
3. Temporary worker/trainee. *See* 8 [U.S.C.](#) § 1101(a)(15)(H).
- a. H-1B, Professional worker in specialty occupation, *see infra* § [5.16](#).
 - b. H-1C, Registered nurse.
 - c. H-2A, Seasonal agricultural worker, *see infra* § [5.17](#).
 - d. H-2B, Seasonal/intermittent nonagricultural worker, *see infra* § [5.18](#).
 - e. H-3, Trainee.
 - f. H-4, Spouse or child of person with H-1, H-2, or H-3 visa.
 - g. TN, United States-Mexico-Canada Free Trade Agreement (USMCA) professional. *See* 8 [U.S.C.](#) § 1184(e).
4. Exchange visitor, student, trainee, researcher, or professor. *See* 8 [U.S.C.](#) § 1101(a)(15)(J).
- a. J-1, Exchange alien.
 - b. J-2, Child or spouse of person with J-1 visa.
5. Fiancé(e) or spouse of U.S. citizen, or minor child of U.S. citizen's fiancé(e) or spouse. *See* 8 [U.S.C.](#) § 1101(a)(15)(K).
- a. K-1, Fiancé(e) of U.S. citizen.
 - b. K-2, Minor child of fiancé(e).
 - c. K-3, Spouse of U.S. citizen.
 - d. K-4, Minor child of U.S. citizen's spouse.
6. Intracompany transferee, *see infra* § [5.20](#). *See also* 8 [U.S.C.](#) § 1101(a)(15)(L).
- a. L-1, Multinational manager or executive, *see infra* § [5.20](#).
 - b. L-2, Child or spouse of person with L-1 visa.
7. Vocational/nonacademic student. *See* 8 [U.S.C.](#) § 1101(a)(15)(M).
- a. M-1, Student.

- b. M-2, Spouse or child of person with M-1 visa.
- c. M-3, Border commuter student.

D. Less Common Categories [§ 5.175]

1. Foreign-government official. *See* 8 [U.S.C.](#) § 1101(a)(15)(A).
 - a. A-1, Ambassador, public minister, career diplomat, or consular officer and members of his or her immediate family.
 - b. A-2, Other government official or employee and immediate family.
 - c. A-3, Attendant, servant, or personal employee of person with A-1 or A-2 visa.
2. C, Alien in transit. *See* 8 [U.S.C.](#) § 1101(a)(15)(C).
3. D, Crew member. *See* 8 [U.S.C.](#) § 1101(a)(15)(D).
4. Treaty trader or investor. *See* 8 [U.S.C.](#) § 1101(a)(15)(E).
 - a. E-1, Treaty trader and his or her spouse and children.
 - b. E-2, Treaty investor and his or her spouse and children.
5. Representative of international organization. *See* 8 [U.S.C.](#) § 1101(a)(15)(G).
 - a. G-1, Principal resident representative of recognized foreign government that is member of international organization and his or her staff and immediate family.
 - b. G-2, Other representative of recognized foreign government to international organization and his or her immediate family.
 - c. G-3, Alien who would qualify under G-1 and G-2, but alien's government is not recognized *de jure* by U.S.
 - d. G-4, International organization officer or employee and his or her immediate family.
 - e. G-5, Attendant, servant, or personal employee of person with G-1, G-2, G-3, or G-4 visa.
6. I, Representative of foreign information media. *See* 8 [U.S.C.](#) § 1101(a)(15)(I).
7. N, Parent or child of certain G visa holder. *See* 8 [U.S.C.](#) § 1101(a)(15)(N).
8. Alien of extraordinary ability in sciences, arts, education, business, or athletics. *See* 8 [U.S.C.](#) § 1101(a)(15)(O).
 - a. O-1, Principal alien.

- b. O-2, Accompanying alien to O-1 artist or athlete.
 - c. O-3, Dependent of person with O-1 or O-2 visa.
9. Internationally recognized athlete, artist, entertainer, or entertainment group. *See* 8 [U.S.C.](#) § 1101(a)(15)(P).
- a. P-1, Athlete, member of entertainment group.
 - b. P-2, Artist or entertainer in reciprocal exchange program.
 - c. P-3, Artist or entertainer in culturally unique program.
 - d. P-4, Dependent of person with P-1, P-2, or P-3 visa.
10. Q, International cultural exchange visitor. *See* 8 [U.S.C.](#) § 1101(a)(15)(Q).
11. R, Alien in religious occupation. *See* 8 [U.S.C.](#) § 1101(a)(15)(R).
12. Informant possessing information regarding criminal or terrorist activities. *See* 8 [U.S.C.](#) § 1101(a)(15)(S).
- a. S-1, Informant for criminal activities.
 - b. S-2, Informant for terrorist activities.
13. T, Certain victims of human trafficking. *See* 8 [U.S.C.](#) § 1101(a)(15)(T).
14. U, Certain victims of substantial physical or mental abuse. *See* 8 [U.S.C.](#) § 1101(a)(15)(U).
15. V, Certain spouses and minor children of lawful permanent residents in U.S. *See* 8 [U.S.C.](#) § 1101(a)(15)(V).

E. Special Designations for Canadian and Mexican Citizens [§ 5.176]

NOTE: Canadian and Mexican citizens may apply for visas as other aliens, but also have special designations and opportunities for entry because of USMCA and the proximity of Canada and Mexico to the U.S.

1. Canadian citizens are exempt from requirement of having a valid visa to enter U.S. unless they seek to enter as K-1 fiancé(e) or E treaty trader/investor. 22 [C.F.R.](#) § 41.2(a).
2. Mexican border crossing card
 - a. Authorizes entry as visitor without visa or passport. 8 [C.F.R.](#) § 212.1(c).
 - b. Passport, but not visa, required if entering U.S. from other than a contiguous territory of U.S.

III. TEMPORARY VISITS, STUDY, TRAINING, AND FAMILY UNITY [§ 5.177]**A. B-1/B-2 Visitors for Business or Pleasure [§ 5.178]**

See 8 [C.F.R.](#) § 214.2(b).

1. Category is for aliens coming to U.S. temporarily as visitors for pleasure or visitors for business.
2. Alien must have nonimmigrant intent (i.e., does not intend and does not take steps toward residing permanently in U.S.) and maintain a domicile abroad. 22 [C.F.R.](#) § 41.31(a)(1).
3. Alien visitors must prove substantial and legitimate ties, such as employment, family, schooling, finances, etc., to country of residence, to which they will return upon completion of travel to U.S., and must prove they have sufficient economic means such that they will not be tempted to engage in unauthorized employment in U.S. 22 [C.F.R.](#) § 41.31(a)(3).
4. Initial grant of admission is generally six months but may be lessened depending on actual nature of legitimate business or pleasure tourism travel needs. Maximum stay in B-1 or B-2 status is one year.
5. Per 22 [C.F.R.](#) § 41.31(b)(1), B-1 visitor for business allows alien to enter U.S. to
 - a. Engage in commercial transactions (i.e., buying or selling) that do not involve gainful employment in U.S. and that involve products produced outside of the U.S.;
 - b. Negotiate contracts on behalf of foreign entity;
 - c. Consult with business associates, including attending meetings at U.S. corporation;
 - d. Participate in litigation;
 - e. Participate in scientific, educational, professional, or business conventions, conferences, or seminars and will not receive any remuneration from a U.S. source; or
 - f. Undertake unpaid independent research for the benefit of non-U.S. entity or institution.
6. B-1 visitor for business may not engage in actual employment in U.S. for the benefit of U.S. employer, but U.S. entity may reimburse alien or pay for alien's incidental expenses.
7. B-2 visitor for pleasure may enter U.S. for sightseeing, recreation, medical treatment, enrollment in vocational or recreational schooling, casual short durations of study (e.g., attending a several-weeks-long enrichment class) not intended to teach a vocation or confer degree or certification, and visiting family or friends. 22 [C.F.R.](#) § 41.31(b)(2).
8. Individual may use B-2 status to look for school or employment if he or she advises DOS visa officer at time of visa application that this is the purpose of desire to enter U.S.

9. Visa requirement is waived for nationals from certain countries entering U.S. in visitor status under the Visa Waiver Program (VWP) (<https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> (last visited Apr. 12, 2022)).
 - a. Aliens are authorized to engage in “B” (temporary visitor) nonimmigrant category activities.
 - b. In lieu of applying for a visa before traveling to U.S., alien applies for admission at U.S. port of entry by presenting proof of citizenship of designated VWP participating country (40 countries designated) via valid passport (passport must be an e-passport, contain a digital photograph, or be machine-readable) and return-trip ticket to any place outside U.S. (if by air or sea) or proof of domicile abroad (if by land). 8 [C.F.R.](#) § 217.2.
 - c. All aliens seeking admission to U.S. under VWP must obtain travel authorization online through the Electronic System for Travel Authorization (ESTA) (<https://esta.cbp.dhs.gov/esta> (last visited Apr. 12, 2022)).
 - d. Aliens must have an e-passport to use the VWP.
 - e. Authorized stay limited to 90 days per admission and cannot be extended.
 - f. Aliens entering by the VWP are not eligible to change their visa status in U.S., extend their status, or apply for permanent residence except in a few circumstances (e.g., after marrying U.S. citizen).

B. F-1 Student Visas [§ 5.179]

1. Category is for students enrolled in full course of study at U.S. college, university, seminary, conservatory, academic high school, private elementary school, other academic institution, or language training program.
2. Academic institution must first receive accreditation from DHS to sponsor and enroll students in F-1 status.
3. Alien/student must have unabandoned foreign residence to which alien/student intends to return. 22 [C.F.R.](#) § 41.61(b)(iv).
4. Alien/student must prove he or she has sufficient funds to pay for school and living expenses. 22 [C.F.R.](#) § 41.61(b)(ii).
5. Ability to engage in employment is restricted, but several options exist, including on-campus employment, curricular practical training, and optional practical training. 8 [C.F.R.](#) § 214.2(f)(9).

C. J-1 Exchange Visitors [§ 5.180]

1. Category encompasses 13 different kinds of subcategories under which “sponsors” approved by DOS locate, select, and authorize exchange visitors to come to U.S. as student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill. 22 [C.F.R.](#) § 62.4; 22 [C.F.R.](#) §§ 62.20–.32.

2. Alien is issued Form DS-2019 from approved J-1 sponsoring entity and then may apply for J-1 visa. DOS Form DS-2019.
3. Per 8 [U.S.C.](#) § 1182(e) and 22 [C.F.R.](#) § 41.63, entry in J-1 status may subject alien to requirement that he or she return to home country or country of last residence for two years after completion of program before he or she can change to H, L, K, or permanent resident status—two-year home residence requirement may be waived if:
 - a. Alien obtains “no objection” statement by alien’s country of nationality or last residence (not available for physicians who engaged in postgraduation medical training in J-1 status);
 - b. Departure from U.S. would cause exceptional hardship to J-1 visitor’s U.S. citizen or permanent resident spouse or child;
 - c. Return to country of nationality or last residence would subject alien to persecution on account of race, religion, or political opinion; or
 - d. Interested U.S. governmental agency shows that alien’s departure from U.S. would be contrary to national interests and would be detrimental to a program or activity of the agency.
4. Alien must have unabandoned foreign residence to which alien intends to return.
5. Ability to engage in employment is restricted and depends on J-1 subcategory in which alien is engaging.

D. K-1/K-3 Fiancé(e) or Spouse [§ 5.181]

1. Category K-1 is for fiancé(e) of U.S. citizen and K-3 is for spouse of U.S. citizen.
 - a. K-1 facilitates entry of fiancé(e) so marriage to U.S. citizen can occur in U.S. and then allows alien to reside in U.S. until granted permanent residency. 8 [C.F.R.](#) § 214.2(k)(1).
 - (1) Marriage must occur within 90 days after alien’s entering U.S. in K-1 status. 8 [C.F.R.](#) § 214.2(k)(5).
 - (2) Petition filed by U.S. citizen at CIS Regional Service Center having jurisdiction over place where U.S. citizen resides. CIS Form I-129F.
 - (3) Upon petition approval, notification is sent to DOS’s National Visa Center, which will then notify U.S. consulate or embassy in or with jurisdiction over place where alien fiancé(e) resides to have visa application procedure initiated.
 - (4) Once marriage occurs within 90 days after K-1 admission, alien may apply for adjustment of status to permanent residency. CIS Form I-485.
 - (5) K-1 alien may apply for employment authorization.

- b. K-3 facilitates entry of spouse of U.S. citizen in nonimmigrant status to avoid separating couple during time it takes alien to apply for permanent residency.
 - (1) U.S. citizen petitioner must concurrently file or have previously filed CIS Form I-130. CIS Forms I-129F, I-130.
 - (2) Alien relative is admitted in K-3 status for up to two years, during which time he or she must apply for adjustment of status to permanent residence status.
 - (3) Work authorization allowed.

IV. TEMPORARY EMPLOYMENT OF ALIENS [§ 5.182]

A. H-1B Professionals [§ 5.183]

See 8 [U.S.C.](#) § 1101(a)(15)(H)(i)(b); 8 [U.S.C.](#) § 1184(i).

1. Category restricted to aliens in a specialty occupation, fashion models of distinguished merit and ability, or alien providing services related to Department of Defense cooperative research and development or co-production project.
2. Per 8 [C.F.R.](#) § 214.2(h)(4), the term *specialty occupation* is defined as an occupation that requires
 - a. The theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialists, accounting, law, theology, and the arts; and
 - b. The attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum entry into the occupation in the U.S.
3. CIS has consistently interpreted the term "degree" in the criteria at 8 [C.F.R.](#) § 214.2(h)(4)(iii)(A) to mean not just any bachelor's or higher degree, but one in a specific specialty that is directly related to the proffered position. The Administrative Appeals Office (AAO) has, however, consistently clarified that this interpretation of the term degree does not require that a position may require only one specific type of bachelor's or higher degree to qualify as an H-1B caliber specialty occupation. Instead, provided the specialties are closely related (e.g., chemistry and biochemistry) a minimum of a bachelor's degree or higher in the closely related specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act.
 - a. Generally accepted H-1B level positions include teacher, physician, engineer, system analyst, financial analyst, accountant, chemist, market research analyst, network analyst, physical therapist, and computer programmer (these are just examples; hundreds of other positions potentially qualify). Martin J. Lawler, *Professionals: A Matter of Degree* 226–71, 425–34 (5th ed. 2009).
 - b. General business, management, sales, retail, and clerk positions are routinely rejected from being considered H-1B level positions. General nursing (including registered nursing) positions are also generally not considered to qualify for H-1B status.

- c. Positions for which there is an emerging trend to require bachelor's degree or higher education for entry may qualify for H-1B status even if previously no degree was required for entry.
4. H-1B status can be granted for up to three years and may be extended thereafter to maximum of six years (six-year limit can be extended for certain beneficiaries of pending or approved labor certification applications or immigrant visa petitions). 8 [C.F.R.](#) § 214.2(h)(13)(iii)(A), (15)(ii)(B)(1); AC 21, Pub. L. No. 106-313; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 (2002).
5. Employer must pay alien higher of actual or prevailing wage for duration of H-1B status. 20 [C.F.R.](#) § 655.731(a).
 - a. Prevailing wage is the average rate of wages paid to workers similarly employed in the area of intended employment. 20 [C.F.R.](#) § 655.731(a). The sources of prevailing wage, in order of acceptability by the DOL, are
 - (1) Union contract between union and employer. 20 [C.F.R.](#) § 655.731(a)(2)(i).
 - (2) A determination from the DOL's OFLC National Processing Center. 20 [C.F.R.](#) § 655.731(a)(2)(ii)(A).
 - (3) An independent authoritative source survey. 20 [C.F.R.](#) § 655.731(a)(2)(ii)(B).
 - (4) Another legitimate source of wage information, such as a comprehensive employer-conducted survey. 20 [C.F.R.](#) § 655.731(a)(2)(ii)(C).
 - b. Actual wage is the wage paid by the employer to all individuals with similar experience and qualifications in the area of intended employment. 20 [C.F.R.](#) § 655.731(a)(1).
6. Employer must obtain Labor Condition Application (LCA) certification from DOL attesting that employer will comply with applicable H-1B wage and working condition requirements. The LCA is completed and filed online. 20 [C.F.R.](#) § 655.730; DOL Forms ETA 9035, 9035E, <https://www.foreignlaborcert.doleta.gov/form.cfm> (last visited Apr. 12, 2022); <https://flag.dol.gov> (last visited Apr. 12, 2022).
 - a. Employers must attest in the LCA all the following:
 - (1) The alien will be paid the higher of actual or prevailing wage.
 - (2) The alien's employment will not adversely affect the working conditions of similarly employed workers.
 - (3) No strike, lockout, or work stoppage is pending in the alien's occupational category with the employer.
 - (4) Similarly employed employees have been notified of the employer's intent to hire an H-1B worker and to file an LCA for such H-1B employment.

- (5) The employer will retain and immediately make available for public inspection at its U.S. headquarters or the place of employment for the H-1B worker a copy of the LCA and enough documentation to prove the employer's compliance with the requirements listed in items 1 through 4 above. 20 [C.F.R.](#) § 655.705(c)(1)–(5).
7. H-1B approvals are subject to strict quotas: 65,000 per year for bachelor's degree holders (U.S. or foreign), plus additional 20,000 approvals for aliens who have master's degree or higher from an accredited U.S. institution (e.g., H-1B cap). 8 [U.S.C.](#) § 1184(g)(1)(A); <https://uscis.gov> (last visited Apr. 12, 2022).
8. Every H-1B petition is specific to a certain alien for a specific employer, position, job location, and pay. Material changes to an alien's H-1B job duties, location, or pay generally require the filing of an amendment petition before the change occurring.
9. Certain employers and certain aliens may be exempt from annual H-1B quota and therefore eligible to obtain H-1B status or change H-1B employers at any time. 8 [U.S.C.](#) § 1184(g); *see* IIRIRA.
 - a. The quota does not apply to H-1B petitions filed to extend the amount of time a current H-1B worker may remain in the U.S. unless the alien (except for individually exempt aliens) is changing positions from an employer who is exempt to an employer who is subject to the H-1B quota limitations.
 - b. The quota does not apply to individuals who have already been counted toward an H-1B quota within the past six years. 8 [U.S.C.](#) § 1184(g)(7).
 - c. The quota does not apply to H-1B petitions filed for employment at an institution of higher education or a related or affiliated nonprofit entity or for employment at a nonprofit research organization or a governmental research organization. 8 [U.S.C.](#) § 1184(g)(5); 81 Fed. Reg. 82,398, 82,484, 82,486 (Nov. 18, 2016).
 - d. The quota does not apply to H-1B petitions filed to change the terms of employment for current H-1B workers.
 - e. The quota does not apply to H-1B petitions filed to allow current H-1B workers to change H-1B employers unless the alien (except for individually exempt aliens) is changing positions from an employer who is exempt to an employer who is subject to the H-1B quota limitations.
 - f. The quota does not apply to H-1B petitions filed to allow current H-1B workers to work concurrently in a second H-1B position.
 - g. The quota does not apply to H-1B petitions for J-1 foreign medical graduates who have received a waiver of the two-year foreign-residence requirement based on their commitment to serve the medical needs of a state or interested federal governmental agency.
10. Some registered nursing positions may qualify for H-1C status if position is located at a qualifying hospital located in a federally designated medically underserved location. Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95; *see* DOL Form ETA 9081; 20 [C.F.R.](#) §§ 655.1101–.1255.

B. H-2A Seasonal Agricultural Workers [§ 5.184]

1. Category for temporary or seasonal workers in any job related to cultivating, harvesting, processing, storing, or delivering to market any product arising from any living thing. 8 [C.F.R.](#) § 214.2(h)(5).
 - a. Employment is seasonal if it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, and requires labor levels far above those necessary for ongoing operations. 20 [C.F.R.](#) § 655.103(d).
 - b. Employment is temporary if the employer's need for a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 [C.F.R.](#) § 655.103(d).
2. Labor certification from DOL for temporary or seasonal position is required. 20 [C.F.R.](#) § 655.101.
3. Only available to workers from certain designated countries or workers whose employment in the U.S. is determined to be in the U.S. interest. This determination is made on an annual basis. 8 [C.F.R.](#) § 214.2(h)(6)(i)(E); 86 Fed. Reg. 62,562 (Nov. 10, 2021) (identifying 85 countries).
4. Labor certification can be filed by employer or by association of which employer is member.
5. Employer electronically files H-2A Agricultural Clearance Order (ETA-790/790A) via the Foreign Labor Application Gateway (FLAG) system no more than 75 days and no fewer than 60 days before employment is to begin. FLAG will route the job order to the appropriate state workforce agency (SWA). 20 [C.F.R.](#) §§ 655.130–.135; 84 Fed. Reg. 49,439–57 (Sept. 20, 2019) (final rule); DOL Forms ETA-9142A, ETA-790/790A.

Employer seeking to employ foreign workers in jobs related to the herding or production of livestock files the H-2A Agricultural Clearance Order (ETA-790/790A) directly with the Chicago National Processing Center, along with the Temporary Employment Certification (ETA-9142A). 20 [C.F.R.](#) § 655.205; 20 [C.F.R.](#) § 655.215. May file herding or livestock production files no less than 45 days before employment is to begin.

6. Employer electronically files Temporary Employment Certification (ETA-9142A), including ETA-9142 Appendix A, via the FLAG System, no fewer than 45 days before date on which workers will be needed.
7. Employer must engage in positive recruitment process to test labor market for available and qualified U.S. workers once the Chicago National Processing Center accepts Temporary Employment Certification (ETA-9142A) and advises employer to begin recruitment. 20 [C.F.R.](#) §§ 655.100–.185.
 - a. Employers must contact, by letter or other effective means, former employees (except those terminated for cause or who abandoned the worksite) who worked in the same position within previous year.
 - b. Employers must advertise position in state job-order system and newspapers covering area of employment. Positions for herding or production of livestock need not be advertised in newspaper. 20 [C.F.R.](#) § 655.220.

- c. Employers must also conduct additional recruitment steps within a multistate area to seek applicants from the employer's traditional or expected labor supply.
 - d. Employers must continue to accept referrals of U.S. workers from SWA until 50% of designated work period expires.
 - e. U.S. workers who respond to recruitment may be disqualified by employers only for legitimate, job-related reasons. 20 [C.F.R.](#) § 655.102(k).
8. Employers must offer, advertise in recruitment, and pay the higher of the adverse effect wage rate (AEWR), the prevailing hourly wage or piece rate, the agreed-on collective bargaining wage, or federal or state minimum wage, except when a special procedure is approved for an occupation or a specific class of agricultural employment. 20 [C.F.R.](#) § 655.120; 20 [C.F.R.](#) § 655.122.
9. Employers must also provide (a) housing at no cost for workers who are not able to easily return to their residence daily, (b) worker's compensation insurance coverage, (c) guaranteed employment for at least 3/4 of the work days in the offered period of employment, (d) return-trip transportation or reimbursement for any worker terminated early for lack of work, and (e) a written contract in a language understood by the worker. 20 [C.F.R.](#) § 655.122(a)–(q); 80 Fed. Reg. 62,981–82, 63,007–08 (Oct. 16, 2015) (final rule).

Employers of workers in the herding or production of livestock must also provide, free of charge, range housing and other adequate sleeping facilities; all tools, supplies, and equipment required for job; emergency communication equipment; adequate food and cooking facilities; bathing facilities; waste removal; insect and rodent control; and adequate potable water. 20 [C.F.R.](#) § 655.610; 20 [C.F.R.](#) § 655.230; 20 [C.F.R.](#) § 655.235.

10. On obtaining temporary labor certification, employer files petition with CIS listing either named or unnamed beneficiaries; unnamed beneficiaries must be outside U.S. CIS Form I-129; 8 [C.F.R.](#) § 214.2(h)(5)(i).
11. Approval of petition is usually valid for less than one year, with few exceptions. 20 [C.F.R.](#) § 655.100(d)(3).
12. Employers and any recruiters they work with cannot collect any job placement fee or other compensation from a worker, as compensation for the worker's H-2A employment. 8 [C.F.R.](#) § 214.2(h)(5)(xi).
13. Once worker accumulates a total of three years in continuous H-2A status, worker must remain outside U.S. for three uninterrupted months. 8 [C.F.R.](#) § 214.2(h)(5)(viii)(C).
14. Employer must notify CIS within two work days if an H-2A worker fails to report to work, absconds from work without consent of employer, has his or her employment terminated, or completes services early. 8 [C.F.R.](#) § 214.2(h)(5)(vi).

C. H-2B Nonagricultural Workers [§ 5.185]

1. Category for short-term, full-time, nonagricultural positions that arise because of seasonal, intermittent, peak load, or one-time need. 8 [C.F.R.](#) § 214.2(h)(6).

- a. Seasonal need is shown when need for services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. 8 [C.F.R.](#) § 214.2(h)(6)(ii)(B)(2).
 - b. One-time occurrence is shown when employer has not employed workers to perform the services or labor in the past and will not need workers to perform the services or labor in the future, or when employer has an employment situation that is otherwise permanent, but a temporary event of short duration has created need for the services or labor. 8 [C.F.R.](#) § 214.2(h)(6)(ii)(B)(1).
 - c. Peak-load need is shown when a seasonal or short-term demand creates a need for an employer to supplement its permanent staff on a temporary basis. 8 [C.F.R.](#) § 214.2(h)(6)(ii)(B)(3).
 - d. Intermittent need is shown when employer typically has not employed full-time or permanent workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods. 8 [C.F.R.](#) § 214.2(h)(6)(ii)(B)(4).
2. Equally available to skilled and unskilled workers.
 3. H-2B status can be granted for duration of temporary labor certification, generally nine months or less, or up to one year, and in the case of a one-time event, up to three years, and may be extended thereafter in increments of up to one year to a total maximum period of stay of three years; but short-term nature of position may be questioned by CIS if requested validity time is one year or if repeated extensions are requested. 20 [C.F.R.](#) § 655.6; 8 [C.F.R.](#) § 214.2(h)(6)(ii)(B); 8 [C.F.R.](#) § 214.2(h)(15)(ii)(C).
 4. Temporary labor certification is required, *see infra* § [5.19](#).
 5. Only available to workers from certain designated countries or workers whose employment in the U.S. is determined to be in the national interest. This determination is made on an annual basis. 8 [C.F.R.](#) § 214.2(h)(6)(i)(E); 86 Fed. Reg. 62,562 (Nov. 10, 2021) (listing 86 designated countries).
 6. Overall annual cap of 66,000 H-2B petition approvals for workers not already in H-2B status, which is divided into two halves of the fiscal year (first half is October 1–March 31; second half is April 1–September 30). 8 [C.F.R.](#) § 214.2(h)(8)(i)(C).

D. Procedure for Temporary Alien Labor Certification (H-2B) [§ 5.186]

1. To test the market for available and qualified U.S. workers, employers must engage in a shortened prefiling recruitment process that is similar to pre-PERM (Program Electronic Review Management) supervised recruitment process. 20 [C.F.R.](#) §§ 655.1–81; 8 [C.F.R.](#) § 214.2(h)(6)(iii); 84 Fed. Reg. 62,431–47 (Nov. 15, 2019) (final rule); *see infra* § [5.43](#).
 - a. Unless employer can show emerging situation exists, employer must first obtain prevailing wage determination from DOL’s OFLC National Prevailing Wage Center (NPWC) for position before engaging in prefiling recruitment. 20 [C.F.R.](#) § 655.10(c); 20 [C.F.R.](#) § 655.15(a); 20 [C.F.R.](#) § 655.17; 84 Fed. Reg. 62,431–47 (Nov. 15, 2019) (final

rule). This prevailing wage determination request (ETA-9141) is submitted via the FLAG system: <https://flag.dol.gov/> (last visited Apr. 12, 2022). DOL recommends filing request for prevailing wage determination 60 days before date it will be needed for next step.

- b. Employer must then place job order with SWA serving the area of intended employment, see <https://www.dol.gov/agencies/eta/foreign-labor/contact> (last visited Apr. 12, 2022), and simultaneously file H-2B Application for Temporary Employment Certification (ETA-9142B) with DOL's Chicago National Processing Center via mail or through the FLAG system no more than 90 calendar days and no less than 75 calendar days before desired start date for worker. 20 [C.F.R.](#) § 655.15; 84 Fed. Reg. 62,431–47 (Nov. 15, 2019) (final rule).
 - (1) Employers may request certification for multiple openings for named or unnamed beneficiaries. 20 [C.F.R.](#) § 655.15; 84 Fed. Reg. 62,431–47 (Nov. 15, 2019) (final rule); DOL Form ETA 9142B.
 - (2) Job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering H-2B workers. 20 [C.F.R.](#) § 655.18(a)(1).
 - (3) Job order may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. *Id.*
 - (4) Job order must list each job qualification and requirement and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by other employers in the same occupation and area of intended employment. 20 [C.F.R.](#) § 655.18(a)(2).
- c. Employer must offer wage that meets certain DOL criteria and same terms and working conditions as offered to U.S. workers. 20 [C.F.R.](#) § 655.20(a); 84 Fed. Reg. 62,431–47 (Nov. 15, 2019) (final rule).
- d. If DOL accepts the complete job order and Temporary Employment Certification (ETA-9142B), DOL will instruct employer to begin prescribed recruitment efforts within 14 days and instruct applicable SWA to circulate job order.
- e. DOL will redact any confidential information contained within employer's job order and post position with DOL's electronic job registry at <https://SeasonalJobs.dol.gov> (last visited Apr. 12, 2022). Although advertisements will be placed online, employers are not required to have internet access. DOL's posting will direct U.S. workers who are interested in a particular job opportunity to apply to employer by using employer's contact information.
- f. Employers subject to collective bargaining agreements for position category must notify affected union of the position opening. 20 [C.F.R.](#) § 655.45; 84 Fed. Reg. 62,431–47 (Nov. 15, 2019) (final rule).
- g. A recruitment report must be prepared by employer explaining recruitment efforts and recruitment results. 20 [C.F.R.](#) § 655.48; 80 Fed. Reg. 24,125 (Apr. 29, 2015) (interim final rule). Under 20 [C.F.R.](#) § 655.48(1), the report must do the following:

- (1) Describe each recruitment activity;
 - (2) List name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report and the disposition of each worker's application, including whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;
 - (3) Confirm that former U.S. employees were contacted and the means of contact;
 - (4) Confirm that any applicable bargaining representative was contacted and by what means, or that the required job postings were made;
 - (5) Confirm that any community-based organization designated by the DOL was contacted;
 - (6) Confirm that additional recruitment was conducted as directed by the DOL; and
 - (7) Describe the lawful job-related reason(s) for not hiring each U.S. worker who applied for the position.
2. Once employer obtains favorable determination from DOL, employer must file petition for nonimmigrant worker accompanied by favorable temporary labor certification application determination with CIS Service Center having jurisdiction over place of employment. Petition may request approval for multiple openings for named or unnamed beneficiaries. 8 [C.F.R.](#) § 214.2(h)(6)(iii); CIS Form I-129.
- a. Start date listed in petition must be same start date listed in temporary labor certification application. 8 [C.F.R.](#) § 214.2(h)(6)(iv)(D).
 - b. Employer must notify CIS within two workdays if an H-2B worker fails to report to work, absconds from work without consent of employer, has his or her employment terminated, or completes services early. 8 [C.F.R.](#) § 214.2(h)(6)(i)(F).

E. L-1 Intracompany Transferees [§ 5.187]

1. Category restricted to executives, managers, and employees with specialized knowledge in a profession who have been employed with overseas office, affiliate, subsidiary, parent, or branch office for one continuous year out of three years immediately preceding filing of petition and seeking to perform in a similar executive or managerial capacity or to perform professional specialized knowledge duties in U.S. 8 [C.F.R.](#) § 214.2(l)(3).
2. The one year of employment must be continuous, although short periods of time spent in the U.S. will not interrupt the one year but will also not count toward fulfilling the one year.
3. Per 8 [C.F.R.](#) § 214.2(l)(1)(ii)(C), *executive capacity* means
 - a. Directs the management of the organization or a major component or function;
 - b. Establishes goals and policies;

- c. Exercises wide latitude in discretionary decision making; and
 - d. Receives only general supervision or direction from higher level executives, board of directors, or stockholders.
4. Per 8 [C.F.R.](#) § 214.2(l)(1)(ii)(B), *managerial capacity* means
- a. Primarily manages the organization, department, subdivision, function, or component of the company;
 - b. Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, department, or subdivision of the company;
 - c. Has authority to hire and fire or recommend personnel actions (if other employees directly supervised), or if no direction supervision, functions at a senior level within the hierarchy or as to function managed; and
 - d. Exercises discretion over day-to-day operations of the activity or function.
5. Per 8 [C.F.R.](#) § 214.2(l)(1)(ii)(D), *specialized knowledge* means
- a. Someone with unique knowledge of the company product, service, research equipment, techniques, management, or other interests and its application in international markets, or has an advanced level of knowledge of processes and procedures of the company;
 - b. The individual's specialized knowledge is not readily available in the U.S. labor market;
 - c. Knowledge that is valuable to the employer's competitiveness in the market place;
 - d. Contributes to the U.S. employer's knowledge of foreign operation conditions;
 - e. Having served as a key employee abroad and having been given significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial position; and
 - f. Knowledge that can be gained only through extensive prior experience with that employer.
6. Does not require full-time employment in the U.S. but must dedicate a *significant* portion of time in the U.S. on a regular and systematic basis.
7. During whole period of validity of the L-1 visa, there must be a qualifying relationship between the U.S. company and a foreign entity. Does not necessarily need to be the location from which the foreign national was transferred to the U.S.
8. L-1 status can be held initially up to three years and may be extended to maximum of five years for employees with specialized knowledge (L-1B) or seven years for managers and executives (L-1A) in two-year increments. CIS Form I-129.

If petitioning U.S. entity has been doing business for less than one year, then initial L-1 status may only be granted for one year. 8 [C.F.R.](#) § 214.2(l)(3)(v).

9. Employer may file petition with CIS for individual alien, or certain employers may seek “Blanket L” certification so that qualifying aliens may apply for L-1 visa at U.S. consulate or embassy under Blanket L without need for CIS approval of individual petition.
 - a. Per 8 [C.F.R.](#) § 214.2(l)(4), eligibility for status as a Blank L employer requires that the employer
 - (1) Have at least one office in the U.S. that has been doing business for at least one year;
 - (2) Have three or more domestic and foreign subsidiaries, affiliates, or branches; and
 - (3) Have
 - (a) At least 10 L-1 petitions approved within the last 12 months,
 - (b) Annual consolidated sales of at least \$25 million, or
 - (c) A U.S. workforce of at least 1,000 employees.

F. E1/E2 Treaty Trader/Treaty Investor [§ 5.188]

1. Available to principals and employees of an enterprise, the majority of ownership of which is from a country that has a commerce or investment treaty with U.S. Treaties exist with 78 countries. Some treaties provide for both E-1 and E-2 visas, while others provide for only one. 8 [C.F.R.](#) § 214.2(e).

For employees seeking to qualify, employment in U.S. must be in an executive or senior management position or in a position for which employee has essential knowledge.

2. Visa applicant must have same nationality as that of treaty country.
3. E-1 Treaty Trader. 8 [C.F.R.](#) § 214.2(e)(1).
 - a. Applies to aliens who seek admission to U.S. either as a principal or as an employee of an enterprise that seeks to carry on substantial trade, including trade in services and technology, principally between U.S. and the foreign state that has a commerce or investment treaty with U.S.
 - b. More than 50% of the total volume of enterprise’s international trade conducted must be between U.S. and the treaty country of which the alien is a citizen.

If a U.S. branch office of a foreign firm is engaged principally in trade between the U.S. and the treaty country, it is not material that the office also engages in third-country or intra-U.S. trade or that the firm’s headquarters abroad is engaged primarily in trade with other countries.

- c. Substantiality is determined by volume, monetary value, and frequency of exchanges, as well as by the income derived from the trade.
 - d. Employees of treaty trader enterprise need not be directly involved in trade to qualify.
 - e. There must be an actual exchange of goods, money, or services in the flow of international commerce to qualify.
 - f. Trade must already be substantial at time of visa application.
4. E-2 Treaty Investor. 8 [C.F.R.](#) § 214.2(e)(2).
- a. Alien who seeks to develop and direct the operations of a for-profit commercial enterprise in which he or she has invested a substantial amount of capital, or of an enterprise in which he or she is actively in the process of investing a substantial amount of capital. May alternatively qualify as an alien employed by an enterprise that has invested or is in the process of investing a substantial amount of capital in a U.S. business. Alien or enterprise must irrevocably commit (put at risk) capital that he, she, or it owns or that is in his, her, or its custody, and that was acquired lawfully. 8 [C.F.R.](#) § 214.2(e)(12).
 - b. No specific amount of money is defined as qualifying as a substantial investment. A proportionality test is instead applied in which the amount of invested capital is compared in relation to the total cost of establishing or creating the enterprise. The amount invested in proportion to the cost of the enterprise must establish a financial commitment to the enterprise and be of a magnitude that supports the likelihood that the enterprise will be successful. 8 [C.F.R.](#) § 214.2(e)(14).
5. Enterprise must not be marginal. The law does not require specific dollar amount to prove that the enterprise is not a marginal one. Generally, if the enterprise's income is sufficient to pay the foreign national a standard salary plus a reasonable rate of return on the investment, the marginality requirement should be satisfied. Marginality will generally be found when the enterprise only provides the alien with just enough income to support himself or herself and his or her family at a subsistence level. 8 [C.F.R.](#) § 214.2(e)(15).

G. TN Professional [§ 5.189]

1. TN temporary worker status under USMCA. 8 [U.S.C.](#) § 1184(e); 8 [C.F.R.](#) § 214.6.
 - a. Expedited procedure for Canadian or Mexican citizens seeking to work temporarily in U.S.
 - b. Work in U.S. must fall into one of 63 USMCA-designated professions, and alien must have the credentials listed for the particular profession he or she seeks to engage in. 8 [C.F.R.](#) § 214.6(c).
 - c. Alien simply presents offer of employment or contract to work in USMCA-designated occupation, proof alien meets USMCA's designated credential requirements for occupation, and proof of Canadian or Mexican citizenship—no prior petition with CIS required.

- d. Canadians can document eligibility directly at border instead of applying at embassy or consulate.
- e. Mexicans must apply at U.S. embassy or consulate to obtain visa first.
- f. Spouse and children enter in TD status.
- g. Three-year stay granted at a time, but renewable indefinitely.
- h. No dual intent—must maintain intent to return to Canada or Mexico.

H. R-1 Religious Worker [§ 5.190]

1. Category for ministers, persons working in a professional capacity in a religious occupation or vocation, or persons who work for a religious organization or an affiliate in a religious occupation who have been a member of the religious denomination for at least the two years immediately preceding the application and who are coming to the U.S. to work in such capacities for a bona fide nonprofit religious organization or its affiliate. 8 [C.F.R.](#) § 214.2(r); Pub. L. No. 110-391 (2008).
2. Employment in U.S. must be at least part time (average of at least 20 hours per week).
3. *Religious denomination* is defined as a religious group that has some form of ecclesiastical government; a common belief or statement of faith; some form of worship; a set of religious guidelines, religious services, and ceremonies; established places for worship; religious congregations; or comparable evidence of a bona fide religious organization. 8 [C.F.R.](#) § 214.2(r)(3).
4. *Bona fide religious organization or its affiliate*. 8 [C.F.R.](#) § 214.2(r)(3).
 - a. Organization that is exempt from taxation pursuant to I.R.C. § 501(c)(3) and possesses a currently valid determination letter from the IRS confirming such exemption as a religious organization.
 - b. Affiliated organization that is exempt from taxation pursuant to I.R.C. § 501(c)(3) (although not necessarily as a religious organization), closely associated with a religious denomination, and of a religious purpose and nature that can be documented.
5. *Religious occupation* is an activity relating to a traditional religious function that is recognized as a religious occupation within the denomination. 8 [C.F.R.](#) § 214.2(r)(3).
6. *Religious vocation* is a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. 8 [C.F.R.](#) § 214.2(r)(3).
7. *Minister* is an individual authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and to perform other duties as usually performed by authorized members of the clergy of that denomination. 8 [C.F.R.](#) § 214.2(r)(3).

8. Employer must submit petition to CIS Service Center along with support and documentation. Form 129.
9. Position may be salaried, nonsalaried, or self-supporting. 8 [C.F.R.](#) § 214.2(r)(11).
10. R-1 status can be granted for up to 30 months and may be extended thereafter to a maximum of 5 years. 8 [C.F.R.](#) § 214.2(r)(5), (6).
11. CIS may conduct an on-site inspection of petitioning religious organization before approving any R-1 petition. Inspection may include a tour of facilities, interview of organization's officials, and review of organization's records relating to the organization's compliance with immigration laws and regulations. 8 [C.F.R.](#) § 214.2(r)(16).
12. Employer must notify CIS within 14 days after any change in the alien's employment, including termination. 8 [C.F.R.](#) § 214.2(r)(14).
13. Spouses and unmarried child under the age of 21 may accompany the worker in R-2 status, but they may not work in U.S. in R-2 status. 8 [C.F.R.](#) § 214.2(r)(4)(ii).

I. Premium Processing [§ 5.191]

See CIS Form I-907

1. Expedited processing is available for certain employment-related nonimmigrant and immigrant petitions (e.g., H, L, E, O, TN, P, R, Q).
2. Fee is \$2,500.
3. CIS guarantees case review within 15 calendar days after receiving filing; usually decision on petition is also made within 15 calendar days.

V. IMMIGRANT VISA CATEGORIES OVERVIEW (PERMANENT RESIDENT VISAS/STATUS) [§ 5.192]

A. In General [§ 5.193]

1. Aliens wishing to reside permanently in U.S. may pursue lawful permanent resident status (aka green card status) through several different paths.
2. Primary methods of obtaining permanent resident status are an immigrant petition based on a qualifying family relationship, an immigrant petition based on a future or existing employment relationship, a qualifying investment in an enterprise in the U.S., a "lottery" application, or an application for refugee or asylee status; permanent residency may also be granted as a form of relief in removal proceedings.
3. Process of obtaining permanent residence while in U.S. is referred to as *adjustment of status*; in contrast, process of obtaining permanent residence while outside U.S. is referred to as *consular processing*. 8 [C.F.R.](#) §§ 245.1–.22. *But cf.* 22 [C.F.R.](#) §§ 42.61–.83.

4. Except for very limited categories of aliens, ability to obtain permanent resident status is limited by annual allocation of immigrant visa status numbers. 8 [U.S.C.](#) § 1152; 8 [U.S.C.](#) § 1153.
 - a. Approximately 226,000 visas annually for family based.
 - b. Approximately 140,000 visas annually for employment based.
 - c. 50,000 visas annually for lottery applicants.
5. A preference system divides both family- and employment-based immigrant visa numbers. 8 [U.S.C.](#) § 1153(a), (b).
 - a. Four preference categories for family-based immigrant visas.
 - b. Five preference categories for employment-based immigrant visas.
6. Numerical limitations on immigrant visa numbers may result in a backlog or waiting period on a worldwide basis or for a particular country or preference category.
7. There is a per-country limit (7%) across the total annual allocation of immigrant visa slots.
8. The availability of an immigrant visa number for a particular alien is determined by the preference category and the priority date of the family- or employment-based immigrant petition filed and approved on behalf of the alien as well as the alien's country of chargeability. 8 [U.S.C.](#) § 1152; 8 [U.S.C.](#) § 1153; 22 [C.F.R.](#) § 42.12.
 - a. An alien's *priority date* is generally the date on which a family-based immigrant petition was filed on behalf of the alien or, in the case of an employment-based petition, either the date an application for permanent alien labor certification was filed, if required, or the date the employment-based petition was filed, whichever is earlier. 8 [U.S.C.](#) § 1153(e); 8 [U.S.C.](#) § 1154; 22 [C.F.R.](#) § 42.53.
 - b. An alien's *country of chargeability* is, in general, the country of the alien's birth and is not based on citizenship; however, chargeability may sometimes be claimed based on a spouse's or parent's country of birth. 22 [C.F.R.](#) § 42.12.

B. Immediate Relatives of U.S. Citizens (No Numerical Limitations) [§ 5.194]

1. Spouse, minor child (including the natural sibling of a minor child already adopted or being adopted if natural sibling is also under 18 years of age), or parent of U.S. citizen; U.S. citizen petitioning for a parent must be at least 21 years of age. 8 [U.S.C.](#) § 1151(b)(2).

C. Family-Sponsored Preferences (Subject to Numerical Limitations) [§ 5.195]

1. Per 8 [U.S.C.](#) § 1153(a)(1), first preference is to unmarried sons and daughters 21 years of age or older of U.S. citizens.
2. Per 8 [U.S.C.](#) § 1153(a)(2), second preference is to spouses and children of permanent residents, or unmarried sons and daughters 21 years of age or older of permanent residents.

3. Per 8 [U.S.C.](#) § 1153(a)(3), third preference is to married sons and daughters 21 years of age or older of U.S. citizens.
4. Per 8 [U.S.C.](#) § 1153(a)(4), fourth preference is to brothers and sisters of U.S. citizens who are 21 years of age or older.

D. Family-Sponsored Immigrant Visa Process [§ 5.196]

1. Alien relative of a U.S. citizen or lawful permanent resident is living in U.S. and visa is available (no backlog or waiting period).
 - a. Petition and application for permanent residence filed concurrently at the CIS mail processing center in Chicago. CIS Forms I-130, I-130A, I-485, I-864, I-944.
 - b. CIS Form I-944, Declaration of Self-Sufficiency, has been discontinued as of March 9, 2021. See <https://www.uscis.gov/i-944> (last reviewed or updated Mar. 19, 2021).
 - c. Alien's fingerprints and biometrics must be taken by CIS (applicant will be notified of appointment for fingerprinting).
 - d. Supporting documents must accompany petition and application, including
 - (1) Proof of petitioner's U.S. citizenship or permanent residency;
 - (2) Proof of claimed family relationship between petitioner and applicant (marriage certificate for marriage-based cases; birth certificate for parent- or child-based cases, etc.);
 - (3) Divorce decree for any previous marriages (for both petitioner and applicant if marriage based);
 - (4) Affidavit of support with documentation of petitioner's ability to financially support applicant in U.S., CIS Form I-864;
 - (5) Medical examination of applicant by CIS-certified civil surgeon, CIS Form I-693;
 - (6) Photographs (for both petitioner and applicant if marriage based); and
 - (7) Documentation of bona fides of marriage for marriage-based cases.
 - e. For applications based on marriage to U.S. citizen, interview will be scheduled, at which petitioner and beneficiary must be present and prove validity of marriage—sometimes in-person interviews also scheduled for non-marriage-based cases.
 - f. Approval may be granted either at end of in-person interview at CIS office or after further investigation by CIS. 8 [U.S.C.](#) § 1154(b).
2. Alien relative is living in U.S. and visa is unavailable because of immigrant visa numerical limitations.

- a. Petitioner files petition with accompanying documents at the CIS mail processing center (lockbox facility) in Chicago. CIS Form I-130.
 - b. Once petition approved, petition is either held at National Visa Center until visa is available (if consular processing was requested) or held by CIS (if adjustment of status was requested) until an immigrant visa is available for beneficiary's preference category and country of chargeability according to DOS's Visa Bulletin.
 - c. When visa is available, beneficiary may apply for adjustment of status to permanent residence in U.S. if he or she has maintained lawful status in U.S. and otherwise qualifies, or may apply at U.S. consulate or embassy for an immigrant visa, depending on beneficiary preference; otherwise, beneficiary must apply at U.S. consulate or embassy and may apply for waiver of any grounds of inadmissibility, if applicable. Aliens in removal proceedings must apply for permanent residency directly with immigration judge. CIS Form I-485; DOS Form DS-230; 8 [C.F.R.](#) § 1245.2(a)(1)(i).
3. Alien relative is living abroad.
- a. Petitioner files petition for alien relative, with required documents listed on form. CIS Forms I-130 and I-130A.
 - b. Petition will be adjudicated by CIS and sent to DOS's National Visa Center.
 - c. When visa is available, National Visa Center will send the approval to U.S. consulate or embassy closest to or otherwise having jurisdiction over location where alien relative is residing abroad.
 - d. Consulate will notify alien regarding procedures for applying for permanent residence (consular processing).
 - e. If immigrant visa is not immediately available in preference-based family category, petition will be adjudicated by CIS but held at National Visa Center until priority date becomes current.

E. Conditional Permanent Resident Status [§ 5.197]

1. In some circumstances, alien is granted permanent residence conditionally for two years (e.g., if the alien and U.S. citizen have not been married for two years at the time of initial granting of permanent resident status) to ensure that the basis for receiving permanent residence is not fraudulent. *See* 8 [U.S.C.](#) § 1186a.
2. Alien must remove conditional status by filing petition to remove conditions on residence. CIS Form I-751.
 - a. Petition must be filed jointly by alien spouse and petitioner unless alien can prove hardship exists, in which case alien may file individually. 8 [U.S.C.](#) § 1186a(d)(2).
 - b. Filing period begins 90 days before second anniversary of grant of conditional residence status, and filing must occur before second anniversary.

- c. Ninety-day period is tolled during any time in which alien spouse or petitioning spouse is in American military. 8 [U.S.C.](#) § 1186a(g).
3. If joint filing cannot be made because of termination of marriage, death of spouse, or refusal of petitioning spouse to join in filing petition, alien must file application for waiver of joint filing requirement. 8 [U.S.C.](#) § 1186a(c)(4); 8 [C.F.R.](#) § 216.5(a); CIS Form I-751.
4. Failure to timely file petition automatically results in termination of conditional status; alien is then subject to deportation/removal. 8 [U.S.C.](#) § 1186a(c)(2)(A); 8 [C.F.R.](#) § 216.3.

F. Self-Petitioning Abused Spouse or Child [§ 5.198]

1. Per 8 [C.F.R.](#) § 204.2(c), an abused spouse or child of a U.S. citizen or permanent resident may file his or her own immigrant petition if the alien
 - a. Is the spouse or child of a U.S. citizen or permanent resident;
 - b. Is eligible for immigrant classification based on that relationship;
 - c. Is residing in the U.S.;
 - d. Has resided in the U.S. with the U.S. citizen or permanent resident spouse or parent;
 - e. Has been battered by, or has been the subject of extreme cruelty perpetrated by, the U.S. citizen or permanent resident;
 - f. Is of good moral character;
 - g. Is a person whose deportation would result in extreme hardship to himself, herself, or his or her child; and
 - h. If basis of petition is abusive marriage or intended marriage, has entered into the marriage or engagement to the U.S. citizen or permanent resident in good faith.
2. A battered spouse may also petition on behalf of any of her or his children; a battered child may petition only on his or her own behalf.
3. File self-petition with CIS Vermont Service Center. Form I-360.
4. After petition is filed, neither termination of the abusive marriage nor remarriage by abused spouse will negatively affect the self-petition; an abused child must remain unmarried to remain eligible. 8 [C.F.R.](#) § 204.2(c)(1)(ii).

G. Employment-Based Preferences (Subject to Numerical Limitations) [§ 5.199]

See 8 [U.S.C.](#) § 1153(b).

1. First preference workers, *see infra* § [5.37](#). 8 [U.S.C.](#) § 1153(b)(1).

- a. Aliens with extraordinary ability in the sciences, arts, education, business, or athletics.
 - b. Outstanding professors and researchers.
 - c. Multinational executives and managers transferred to U.S. from foreign parent, subsidiary, affiliate, or branch office.
2. Second preference workers, *see infra* § [5.38](#). 8 [U.S.C.](#) § 1153(b)(2).
 - a. Aliens with exceptional ability in sciences, arts, or business.
 - b. Professionals with advanced degrees.
 3. Third preference workers, *see infra* § [5.39](#). 8 [U.S.C.](#) § 1153(b)(3).
 - a. Professionals without advanced degrees.
 - b. Skilled workers.
 - c. Unskilled workers.
 4. Fourth preference—special immigrants, *see infra* § [5.40](#). 8 [U.S.C.](#) § 1153(b)(4); 8 [U.S.C.](#) § 1101(a)(27).
 - a. Ministers of religion and religious workers.
 - b. Former U.S. government workers.
 - c. Former employees of Panama Canal Company or Canal Zone governments.
 - d. Former officers or employees of international organizations who have long periods of residence in U.S.
 - e. Foreign medical graduates who were licensed and practicing in U.S. as of January 1, 1978.
 - f. Aliens who have been declared dependent on a juvenile court.
 5. Fifth preference—investors, *see infra* § [5.41](#). 8 [U.S.C.](#) § 1153(b)(5).

H. Other Immigrant Categories [§ 5.200]

1. Diversity immigrants (green card lottery). 8 [U.S.C.](#) § 1153(c).
 - a. Alien must come from designated low-admission country (i.e., country that historically has had low numbers of persons emigrating to U.S.). 22 [C.F.R.](#) § 42.33(a)(1).
 - b. Alien must have either (1) high-school education or equivalent or (2) two years' work experience in occupation requiring two years' training or experience.

- c. Limited to 50,000 visas annually.
 - d. Annual application period is designated by Secretary of State, and applications received during this period are processed during following fiscal year; all applications must be submitted online (<https://dvprogram.state.gov> (last visited Apr. 12, 2022)).
2. Registry. 8 [U.S.C.](#) § 1259.
 - a. Alien must document entry into U.S. before January 1, 1972.
 - b. Alien must document continuous residence in U.S. since entry.
 - c. Alien must demonstrate good moral character.
 - d. Alien must be admissible under criminal-related standards (not subject to removal because of commission of criminal offenses).
 3. Cancellation of removal, *see infra* § [5.57](#).

I. Derivatives of Immigrant Petitions [§ 5.201]

1. If an alien is the beneficiary of a family- or employment-based immigration petition, a lottery application, or other immigrant visa petition or application, the alien's spouse and minor unmarried children may qualify for permanent resident status as derivative beneficiaries of the principal alien's status. 8 [U.S.C.](#) § 1153(d); 8 [U.S.C.](#) § 1157(c)(2)(i); 22 [C.F.R.](#) § 42.53(c); 8 [C.F.R.](#) § 204.2(a)(4), (b)(4), (c)(4), (e)(4).
 - a. If an alien obtains permanent residence as an immediate relative of a U.S. citizen, *see supra* § [5.27](#), the alien's spouse or children cannot receive permanent residence as derivative beneficiaries; instead, each individual must be the direct beneficiary of a separate immigrant petition filed on his or her own behalf. 8 [C.F.R.](#) § 204.2(a)(4), (b)(4), (c)(4), (e)(4).
 - b. Derivative spouses and children do not otherwise need a separate immigrant visa filed, although each must still file an individual adjustment of status application or consulate processing application. Form I-485 or DS-230.
 - c. Spouse or child must have been acquired by principal alien before principal's admission to U.S. as a permanent resident or adjustment of status to permanent resident status. 22 [C.F.R.](#) § 42.53(c).
 - (1) *Acquired* for spouse means marriage.
 - (2) *Acquired* for child means born or born to a marriage that occurred before principal's admission to U.S. as a permanent resident or adjustment of status to permanent resident.
 - d. Child must be under the age of 21 and unmarried to derive permanent resident status as derivative beneficiary.

NOTE: Child Status Protection Act may in some instances freeze a child's age below 21 to prevent the child from "aging out" and therefore no longer qualifying as a derivative beneficiary. Pub. L. No. 107-208 (2002); 8 [U.S.C.](#) § 1154(a)(1)(D); 8 [U.S.C.](#) § 1153(h).

J. Asylees and Refugees [§ 5.202]

See also infra §§ [5.46-48](#).

After one year as asylee or refugee in U.S., alien is eligible to apply for permanent residence.

VI. PERMANENT EMPLOYMENT OF ALIENS [§ 5.203]

A. First Preference Workers [§ 5.204]

NOTE: Labor certification is not required, *see infra* §§ [5.42-44](#).

1. Aliens with extraordinary ability

- a. *Extraordinary ability* means "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 [C.F.R.](#) § 204.5(h)(2).
- b. Alien may file petition on own behalf, or employer may file petition.
- c. Offer of employment is not necessary.
- d. Alien must continue to work in field in which he or she has extraordinary ability, and position must itself require extraordinary ability to perform. 8 [C.F.R.](#) § 204.5(h)(5).
- e. Documentation required for meeting extraordinary-ability standard is outlined in regulations; must meet three of ten listed categories of evidence. 8 [C.F.R.](#) § 204.5(h)(3), (4).
- f. Petition for permanent employee with supporting documents is filed at appropriate CIS Regional Service Center. CIS Form I-140.

2. Managers and executives

Alien's previous overseas duties must have primarily involved managerial or executive responsibilities or authority; title without actual performance of duties is insufficient; first-line supervisors do not qualify unless they supervise professionals. 8 [U.S.C.](#) § 1153(b)(1)(C); 8 [C.F.R.](#) § 204.5(j).

- a. Alien must have been employed outside U.S. in an executive or managerial capacity by overseas office, affiliate, subsidiary, or parent of U.S. employer for one out of three years immediately preceding filing of petition; one year does not have to be continuous but must have been full time. 8 [U.S.C.](#) § 1153(b)(1)(C).

- b. Previous overseas employment must have been at managerial or executive level; first-line supervisors do not qualify merely by virtue of supervisory duties unless they supervise professionals. 8 [C.F.R.](#) § 204.5(j)(3).
 - c. If already in U.S. working for petitioning employer in a nonimmigrant status, may look to three-year period immediately preceding entering U.S.
 - d. Previous overseas employment and prospective permanent U.S. employment must primarily involve executive or managerial duties and responsibilities. 8 [C.F.R.](#) § 204.5(j)(2).
 - e. Executives must show they establish goals and policies of the organization or a significant function or component of the organization, direct the management of the organization or a major component of it, and hold a high degree of authority and autonomy in their decision-making.
 - f. Managers must manage the organization or a significant department, subdivision, function, or component of the organization; manage other supervisory or professional employees or manage an essential function of the organization at a senior level; and hold a high degree of authority and autonomy in their decision-making.
 - g. Petition for permanent employee with supporting documents is filed at appropriate CIS Regional Service Center. CIS Form I-140.
3. Per 8 [C.F.R.](#) § 204.5(i), outstanding professors and researchers must have
 - a. International recognition as outstanding in academic area;
 - b. Three years' teaching or research experience; and
 - c. Job offer for tenure, tenure-track, or comparable position.
 - d. Petition for permanent employee with supporting documents is filed at appropriate CIS Regional Service Center. CIS Form I-140.

B. Second Preference Workers [§ 5.205]

NOTE: Labor certification is required, *see infra* §§ [5.42–44](#), but may be waived for certain second preference workers whose need is deemed to be in the national interest. 8 [C.F.R.](#) § 204.5(k)(4)(ii).

1. Aliens with advanced degrees
 - a. Alien must have an advanced degree, but bachelor's degree and five years' progressive experience may be substituted for master's degree unless specific advanced degree required for position.
 - b. Position must require person with an advanced degree or a bachelor's degree and five years' progressive experience.
2. Aliens with exceptional ability

- a. Alien must qualify as person with degree of expertise above that ordinarily encountered in his or her field of science, art, or business. 8 [C.F.R.](#) § 204.5(k)(2).
 - b. Documentation required for meeting exceptional-ability standard is outlined in regulations; must meet three of six outlined categories of achievement. 8 [C.F.R.](#) § 204.5(k)(3)(ii).
 - c. Position itself must require exceptional ability to perform.
3. Aliens whose employment is in national interest
- a. Labor certification process can be avoided, substantially reducing processing time. 8 [C.F.R.](#) § 204.5(k)(4).
 - b. Alien may self-petition or petition may be filed by sponsoring employer. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).
 - c. Alien must be seeking employment in an area of substantial merit and national importance. A wide range of fields of endeavor may qualify, including business, entrepreneurialism, science, technology, culture, health, and education.
 - d. Alien must be well positioned to advance the proposed endeavor of substantial merit and national importance. To determine whether alien meets this requirement, CIS will look at
 - (1) Alien's education, skills, knowledge, and record of success in related or similar fields;
 - (2) Alien's model or plan for future activities in the field of endeavor;
 - (3) Alien's progress toward achieving the endeavor; and
 - (4) The interest of potential customers, users, investors, and other relevant entities or individuals.
 - e. On balance, it must be beneficial to the U.S. to waive the job offer and labor certification requirement before approving the immigrant petition. To determine if alien meets this requirement, CIS will consider such factors as
 - (1) Whether it would be impractical either for the alien to secure a job offer or for a sponsoring employer to obtain labor certification for the endeavor,
 - (2) Whether U.S. would benefit from the alien's national contributions even if qualified U.S. workers are otherwise available, and
 - (3) Whether the national interest of the alien's contributions is sufficiently urgent to warrant foregoing the labor certification process.
 - f. The alien must qualify as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business.

- g. Physicians who agree to work in a federally recognized, medically underserved area for five years can qualify without further showing of national interest. 8 [C.F.R.](#) § 204.12.

C. Third Preference Workers [§ 5.206]

NOTE: Labor certification is required, *see infra* §§ [5.42–.44](#).

1. Professionals without advanced degrees
 - a. Bachelor’s degree is required (combination of experience and education cannot be substituted for degree). 8 [C.F.R.](#) § 204.5(l)(3)(ii)(C).
 - b. Position must require person with at least bachelor’s degree.
2. Skilled workers
 - a. Position must require two years’ training or experience in skilled position. 8 [C.F.R.](#) § 204.5(l)(3)(ii)(B).
 - b. Alien must have minimum credentials for filling position.
3. Unskilled (“other”) workers
 - a. Positions not requiring degree or skilled trade (less than two years’ experience/training). 8 [C.F.R.](#) § 204.5(l)(2).
 - b. Household child-care workers generally do not qualify.

D. Fourth Preference (Special Immigrants) [§ 5.207]

Religious workers. 8 [U.S.C.](#) § 1101(a)(27)(C); 8 [C.F.R.](#) § 204.5(m).

1. Requirements mirror those for R-1, *see supra* § [5.23](#).
2. Alien must have been a member of a religious denomination having a bona fide, nonprofit, religious organization in the U.S. for at least two years immediately preceding the filing of the immigrant visa petition.
3. Alien must have been working as a minister or in a religious vocation or occupation, either abroad or in lawful status in the U.S. for at least a two-year period immediately preceding the filing of the immigrant visa petition.
4. The alien must be seeking to enter the U.S. to
 - a. Work full time (at least 35 hours per week) in a compensated position;
 - b. Solely carry on his or her vocation as a minister or to work in a professional or nonprofessional capacity in a religious vocation or occupation; or

- c. Work for a bona fide, nonprofit religious organization in the U.S. or its affiliate in the U.S.
5. File Form I-360, Petition for Special Immigrant with CIS California Service Center. Form I-360.

E. Fifth Preference (Investors) [§ 5.208]

1. Alien must personally invest, or be actively in the process of investing, capital of not less than \$1,050,000.
2. *Investment* means alien's actual contribution of personal capital; promise to invest is not sufficient. 8 [C.F.R.](#) § 204.6(e).
3. Investment must create at least 10 new full-time jobs for U.S. workers, not including investor's immediate family members. 8 [U.S.C.](#) § 1153(b)(5)(A)(ii).
4. For investment in targeted employment area, required investment may be reduced to \$800,000, and need only indirectly create 10 new full-time jobs for U.S. workers. 8 [U.S.C.](#) § 1153(b)(5)(B)(ii), (C).
5. Alien must be engaged in the management of the investment enterprise.

VII. LABOR CERTIFICATION PROCESS (PROVING NEED FOR ALIEN WORKERS) [§ 5.209]

A. In General [§ 5.210]

1. For many permanent resident visas obtained through employment, and for some temporary visas (e.g., H-2A, H-2B), employer must complete labor certification process with DOL before filing petition with CIS. 20 [C.F.R.](#) pt. 655; 20 [C.F.R.](#) pt. 656.
2. Employer must test labor market by advertising position via a prescribed recruitment process that includes methods such as print advertisements and physical postings to see if any available, willing, able, and qualified U.S. workers want to apply for position. *See, e.g.*, 20 [C.F.R.](#) § 655.0(a)(1); 20 [C.F.R.](#) § 656.1(a).
3. Labor certification application approved only if employer can show no available, willing, able, and qualified U.S. workers for offered position. *See, e.g.*, 20 [C.F.R.](#) § 655.1(a)(1); 20 [C.F.R.](#) § 656.1(a).
4. Employer may disqualify any identified U.S. workers only for legitimate job-related reasons. Minimally qualified standard applies in most cases; however, more-qualified standard applies to college and university teaching positions. *See, e.g.*, 20 [C.F.R.](#) § 656.17(g)(1), (2); 20 [C.F.R.](#) § 656.24(b)(2)(i), (ii); 20 [C.F.R.](#) § 656.18(b)(1)(ii).
5. DOL adjudicates labor certification application.
6. Generally, approval of labor certification is necessary to obtain approval of permanent employment-based visa petition by CIS for professional, skilled, and unskilled positions. 8 [U.S.C.](#) § 1182(a)(5)(A).

7. Special limited-recruitment process exists for college and university teaching positions. 20 [C.F.R.](#) § 656.18.
8. Precertification exists for physical therapists, professional nurses, and aliens of exceptional ability in the sciences, arts, or performing arts, *see infra* § [5.45](#). 20 [C.F.R.](#) § 656.15.

B. Procedure for Permanent Alien Labor Certification [§ 5.211]

1. Employer conducts a recruitment campaign to find qualified U.S. workers during six-month period before filing application. 20 [C.F.R.](#) § 656.17(e); DOL Form ETA 9089.
2. Employer places 30-day job order with SWA.
3. Employer of nonprofessional employee must place two Sunday newspaper ads in addition to the job order.
4. Employer of professional employee must place two Sunday print newspaper ads or one Sunday print newspaper ad and one professional journal print ad as well as conduct three other recruitment efforts, in addition to the job order.
5. Employers must post or provide appropriate notice of the labor certification application at the worksite and also must provide notice via all in-house media.
6. Prevailing wage determination must be submitted through the DOL's FLAG System. Employers can create an account with FLAG at <https://flag.dol.gov> (last visited Apr. 12, 2022). 20 [C.F.R.](#) § 656.10(c)(1); 20 [C.F.R.](#) § 656.40; Form ETA-9141.
7. Employer must have lawful job-related reasons for not hiring U.S. workers. 20 [C.F.R.](#) § 656.17(g).
8. Employer prepares summary of recruitment but does not submit it with the application (only submitted if application is selected for audit).
9. Employer files the application electronically or by mail with appropriate DOL National Processing Center.
10. DOL adjudicates the application; applications are certified, denied, selected for audit, or selected for supervised recruitment. 20 [C.F.R.](#) § 656.24.

C. DOL Schedule A Workers [§ 5.212]

NOTE: DOL has predetermined that there is a need for certain types of workers. Occupations listed in Schedule A do not require labor certification from DOL. 20 [C.F.R.](#) § 656.5; 20 [C.F.R.](#) § 656.15.

1. Physical therapists and registered nurses (alien must provide proof of qualifications to practice in state of intended employment and receipt of CIS health-care-worker certification). 20 [C.F.R.](#) § 656.5(a); 20 [C.F.R.](#) § 656.15(c); *see* 8 [U.S.C.](#) § 1182(a)(5)(C).
2. Aliens with exceptional ability in sciences, arts, or performing arts. 20 [C.F.R.](#) § 656.5(b); 20 [C.F.R.](#) § 656.15(d).

- a. Proof of international recognition is required.
 - b. Alien's work in U.S. must require exceptional ability as defined by CIS.
 - c. Alien must submit evidence establishing alien's work within past year and witnessed exceptional ability in alien's field, as outlined by CIS regulations.
3. Filing requirements, per CIS Form I-140; DOL Form ETA 9089:
 - a. Must file immigrant petition and duplicate completed, but uncertified, labor certification applications for alien at applicable CIS Regional Service Center.
 - b. Must still submit evidence to show job offer meets prevailing wage and that proper in-house notice of filing of labor certification application was given.

VIII. SEEKING PROTECTION [§ 5.213]

A. Refugee [§ 5.214]

1. Per 8 [U.S.C.](#) § 1101(a)(42)(A), to qualify for refugee status, alien must
 - a. Be located physically outside country of nationality or last habitual residence (however, President may allow refugee status in special circumstances for individuals still physically located within their country of nationality or last habitual residence).
 - b. Be located physically outside the territory of the U.S. and physically not at the border of the U.S.
 - c. Have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.
 - d. Be unwilling or unable to return to country of nationality or last habitual residence.
 - e. Be unable or unwilling to avail himself or herself of the protection of country of nationality or last habitual residence.
2. Congress may designate groups as persons who may be granted refugee status under a lower standard of proof that requires only a showing of a well-founded fear of persecution and a credible basis for concern about the possibility of suffering persecution in their country of nationality or last habitual residence.
3. Requests for refugee status generally start with the United Nations High Commissioner for Refugees (UNHCR), a U.S. embassy, or a specially trained nongovernmental organization referring an alien to a DOS-run Resettlement Support Center (RSC).
4. RSCs collect information and prepare a refugee application for review by CIS. CIS reviews the information collected by the RSC and conducts an in-person interview with the applying alien.

5. CIS-approved refugees must receive a sponsorship assurance from a U.S.-based resettlement agency before they are allowed to enter the U.S.
6. Spouses and children of refugees who held such relative status before the primary alien being granted refugee status are admitted as refugees even if they would not individually qualify for refugee status.

B. Asylee [§ 5.215]

1. To qualify for asylum status, alien must
 - a. Either be already physically present in the territory of the U.S. or be seeking physical admission to the U.S. at the U.S. border; or
 - b. Meet the definition for refugee status, *see supra* § [5.47](#).
2. Fact that conditions in person's country are economically poor or politically unstable does not provide basis for asylum.
3. Existence of internal conflict or civil war in country may not form basis for asylum if no particular group is being selectively targeted as part of conflict.
4. Person may not seek asylum merely to avoid serving in military, unless another qualifying basis for asylum also applies.
5. Alien must apply for asylum within one year after alien's arrival in U.S.; alien has one opportunity to apply: if application denied, alien may not be granted asylum in later application unless alien can show existence of extraordinary circumstances or changed circumstances that materially affect alien's eligibility for asylum. 8 [U.S.C.](#) § 1158(a).

C. Application Procedure [§ 5.216]

1. Applicant must file Form I-589 with documents listed on form. CIS Form I-589.
2. Application is filed at CIS Regional Service Center.
3. Extensive supporting evidence is required, such as from the following:
 - a. Newspapers and magazines—both domestic and from applicant's home country;
 - b. Human Rights Documentation Exchange
P.O. Box 2327
Austin, TX 78768;
 - c. United Nations High Commission on Refugees, <https://www.unhcr.org/en-us/> (last visited Apr. 12, 2022);
 - d. Amnesty International, <https://www.amnesty.org/en/> (last visited Apr. 12, 2022);
 - e. Human Rights Watch, <https://www.hrw.org/> (last visited Apr. 12, 2022);

- f. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-democracy-human-rights-and-labor/> (last visited Apr. 12, 2022); or
- g. Center for Gender & Refugee Studies, <https://cgrs.uchastings.edu> (last visited Apr. 12, 2022).

NOTE: The applicant's case should be documented as completely as possible because a notice of intent to deny claim, and ultimately a denial, might be made without an interview if a claim is poorly documented.

- 4. Case may be scheduled for interview.
 - a. For Wisconsin residents, held at Chicago asylum office.
 - b. Applicant has opportunity to present case before asylum officer.
 - c. Witnesses may attend to corroborate applicant's claim.
 - d. Testimony of applicant and witnesses given under oath.
 - e. Applicant should bring additional information to interview to supplement file, if necessary.
 - f. Applicant must provide own interpreter, if needed. 8 [C.F.R.](#) § 208.9(g). For asylum interviews conducted from September 23, 2020, through March 16, 2023, special rules apply. 8 [C.F.R.](#) § 208.9(h).
- 5. Asylum applicant may obtain employment authorization 365 days after filing application if there has not been a denial or applicant-caused delay if case is referred to immigration judge. CIS Form I-765; 8 Fed. Reg. 38,532 (June 26, 2020).
- 6. If application for asylum is approved, alien may apply for permanent residence one year after approval and may continue to work with approved work authorization card.
- 7. If application for asylum is denied, two options are possible:
 - a. If applicant is in legal status at time of decision, applicant will revert to original legal status; or
 - b. If applicant is not in legal status, case is referred to immigration judge for removal proceedings.
 - (1) Case can be reviewed before immigration judge.
 - (2) Original file or new evidence may be brought to support claim.
 - (3) For Wisconsin residents, held in Chicago.

D. Convention Against Torture (CAT) [§ 5.217]

1. The United States may not return an alien to a country where he or she will be tortured. 8 [C.F.R.](#) §§ 208.16–.18; Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, 112 Stat. 2681, 2681–821.
2. Torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for obtaining, from either the individual or a third person, information or a confession, punishing the individual or a third party for an act committed or suspected of having been committed, or intimidating or coercing the individual or third party, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity. 8 [C.F.R.](#) § 1208.18(a)(1). *But see Pangea Legal Servs. v. United States Dep’t of Homeland Sec.*, Nos. 20-cv-09253-JD, 20-cv-09258-JD, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (unpublished) (granting preliminary injunction suspending operation of rule titled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) and calling into doubt validity of 8 [C.F.R.](#) § 1208.18).
3. Torture does not include lesser forms of cruel or inhuman treatment; acts that result in unintended severity of pain and suffering; or lawful sanctions judicially imposed, including the death penalty. 8 [C.F.R.](#) § 1208.18(a)(2), (3), (5).
4. To qualify under CAT, act of torture must be done by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.
5. An alien’s genuine political belief(s) or the basis for the governmental or nongovernmental actor committing the torture against the alien are not relevant to a CAT claim.
6. Alien must prove that he or she is more likely than not to be subject to torture upon removal from the U.S. in order to prevail with CAT claim. 8 [C.F.R.](#) § 1208.16(c)(2).

E. Temporary Protected Status (TPS) [§ 5.218]

1. Per 8 [U.S.C.](#) § 1254a, TPS provides temporary safe haven in the U.S. for
 - a. Aliens whose country of nationality, or if stateless, last country of habitual residence, is experiencing an ongoing armed conflict that poses a serious threat to the personal safety of the country’s nationals if returned there;
 - b. Aliens whose country of nationality, or if stateless, last country of habitual residence, suffered an earthquake, flood, drought, epidemic, or other environmental disaster that is resulting in a substantial, but temporary, disruption of living conditions in the area affected; the foreign state is temporarily unable to handle the return of its nationals; and the foreign state affirmatively requested such designation; or
 - c. Aliens whose country of nationality, or if stateless, last country of habitual residence, is experiencing some other extraordinary and temporary condition(s) that are preventing its nationals from returning safely to it, unless contrary to the national interest of the U.S. to allow such aliens to remain temporarily in the U.S.

2. Alien must establish nationality of or last habitual residence in TPS designated country. 8 [C.F.R.](#) §§ 244.6–9; CIS Form I-821.
3. Alien must have been physically present and continuously residing in the U.S. since date of country's TPS designation.
4. Alien must register for TPS status within the period provided by the U.S. Attorney General.
5. Alien must otherwise be admissible to the U.S., except that certain noncriminal and nonsecurity grounds for inadmissibility are automatically waived.
6. TPS status generally granted in increments of between 6 and 18 months, which may be extended.

IX. REMOVAL [§ 5.219]

A. General [§ 5.220]

1. Removal is the process by which the government seeks to remove an alien from the United States. 8 [U.S.C.](#) § 1225(c)(1); 8 [U.S.C.](#) § 1227; 8 [U.S.C.](#) § 1228.
 - a. Inadmissible versus removable
 - (1) Inadmissibility is the determination that an alien may not be admitted across the border of the U.S.; removability is the determination that an alien must be removed from within the U.S. to outside its borders.
 - (2) In proceedings determining the inadmissibility of an alien, the alien has the burden to establish that clearly and beyond doubt he or she is entitled to admission and not inadmissible pursuant to the INA; or to establish, by clear or convincing evidence, that he or she is lawfully present in the U.S. 8 [U.S.C.](#) § 1229a(c)(2).
 - (3) In proceedings determining the removability of an alien, the government has the burden to establish that the alien is removable by clear and convincing evidence. 8 [U.S.C.](#) § 1229a(c)(3).
 - (4) Aliens applying for relief from removal must establish that they are eligible for relief from removal, they merit a favorable exercise of discretion, and they are credible under the totality of circumstances. 8 [U.S.C.](#) § 1229a(4).
2. Removal proceedings are civil, not criminal, proceedings.
3. Several different forms of removal exist, including
 - a. Summary removal. Officer having authority immediately removes alien from U.S. without further proceedings and usually via and at the expense of the transportation line on which the alien arrived. Procedures do not even rise to level of expedited removal.
 - (1) Crew members. 8 [U.S.C.](#) § 1282; 8 [C.F.R.](#) § 252.1(g).

- (2) Stowaways. 8 [C.F.R.](#) § 235.1(f)(4).
- (3) VWP participants. 8 [U.S.C.](#) § 1187(b); 8 [C.F.R.](#) § 217.4(b)(1).
- (4) Suspected terrorists. 8 [C.F.R.](#) § 235.8.
- (5) S visa recipients or applicants.
- (6) Undocumented aliens intercepted at sea. 8 [C.F.R.](#) § 235.1(f)(3).

NOTE: Summary removal may be avoided if alien makes claim for asylum, but referral to immigration judge will be limited to consideration of asylum claim only. 8 [C.F.R.](#) § 208.2(c)(1). *But see Pangea Legal Servs. v. United States Dep't of Homeland Sec.*, Nos. 20-cv-09253-JD, 20-cv-09258-JD, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (unpublished) (granting preliminary injunction suspending operation of rule titled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) and calling into doubt validity of 8 [C.F.R.](#) § 208.2).

b. Expedited removal

- (1) Arriving aliens. Two classes of arriving aliens may be ordered removed from U.S. by order of an officer having authority, after service of charging document, taking of sworn statement of alien, and determination that alien is not seeking asylum or does not indicate fear of persecution upon removal. No further administrative or judicial review is allowed of removal decision except for on-site supervisory review or if alien claims under oath to be U.S. citizen, permanent resident, refugee, or asylee. 8 [U.S.C.](#) § 1225.
 - (a) Arriving aliens who are inadmissible on the grounds of either misrepresentation or lack of proper entry documentation. 8 [C.F.R.](#) § 235.3(b).
 - (b) Aliens who entered U.S. without being admitted or paroled and who cannot show that they have been physically present in U.S. continuously during preceding two years. 8 [U.S.C.](#) § 1225(b)(1)(A)(iii)(II).
- (2) Aliens convicted of aggravated felonies. Nonresident and conditional resident aliens convicted of aggravated felonies are subject to nonjudicial summary removal proceedings. 8 [U.S.C.](#) § 1228.
 - (a) Proceedings are conducted through ICE trial attorneys.
 - (b) Alien is generally taken into government custody upon the conclusion of the term of imprisonment for underlying aggravated felony. 8 [U.S.C.](#) § 1228(a)(2); 8 [U.S.C.](#) § 1226(c); 8 [C.F.R.](#) § 238.1(g).
 - (c) Conclusive presumption of deportability applies. 8 [U.S.C.](#) § 1228(c).
 - (d) Most forms of relief from removal are not available. 8 [U.S.C.](#) § 1228(b)(5).

- (e) Alien must be given reasonable notices of charges, an opportunity to inspect the evidence, and an opportunity to rebut the charges. 8 [U.S.C.](#) § 1228(b)(4).
 - (f) Proceeding may be put into judicial removal proceedings if alien raises material issue of dispute. 8 [U.S.C.](#) § 1228(c)[second].
 - c. Removal by Immigration Court. Formal removal proceedings are held before immigration judge after Notice to Appear is issued. 8 [U.S.C.](#) § 1229a; 8 [C.F.R.](#) § 1003.14.
 - d. Removal by special terrorist court. 8 [U.S.C.](#) § 1532.
- 4. Aliens may be detained pending removal, released conditioned on bond or other conditions, or released on conditional parole. 8 [U.S.C.](#) § 1226.
- 5. Removal proceedings often begin while aliens are in custody of another authority, such as when aliens are incarcerated after a criminal conviction.
- 6. Government may choose to not commence removal proceedings through informal exercise of discretion or through formalized deferred-action administrative program.
- 7. Aliens may be ordered removed in absentia if notice of removal hearing was provided and government proves by clear, unequivocal, convincing evidence that ground(s) for removal exist. 8 [U.S.C.](#) § 1229a(5).

B. Grounds for Removal [§ 5.221]

- 1. Violation of entry requirements or of visa conditions (e.g., discovery that alien entered illegally, remained beyond expiration of visa, or engaged in activities not authorized by visa). 8 [U.S.C.](#) § 1227(a)(1).
- 2. Criminal offenses (e.g., certain crimes of moral turpitude, criminal violence, controlled substance violations, and aggravated felonies). 8 [U.S.C.](#) § 1227(a)(2).
- 3. Failure to comply with registration requirements or falsifying immigration documents. 8 [U.S.C.](#) § 1227(a)(3).
- 4. Security and related grounds (ever engaging in activities contrary to public safety, national security, or national interests). 8 [U.S.C.](#) § 1227(a)(4); *see also* 8 [U.S.C.](#) § 1182(a)(3).
- 5. Public-charge grounds. 8 [U.S.C.](#) § 1227(a)(5).
- 6. Unlawful voters. 8 [U.S.C.](#) § 1227(a)(6).

C. Rights of Alien in Nonsummary or Nonexpedited Removal [§ 5.222]

- 1. Alien has right to be represented by legal counsel of own choosing, but at no expense to the government. 8 [U.S.C.](#) § 1229a(b)(4)(A).

2. Alien has right to examine evidence, present witnesses, and cross-examine government witnesses. 8 [U.S.C.](#) § 1229a(b)(4)(B).
3. Limited discovery before hearing is available, through following methods:
 - a. Freedom of Information Act (FOIA). 5 [U.S.C.](#) § 552.
 - b. Subpoena of individuals and documents. 8 [C.F.R.](#) § 287.4(a)(2)(ii).
 - c. Depositions and interrogatories upon order of immigration judge. 8 [C.F.R.](#) § 1003.35.
4. Application for relief from removal is made before immigration judge, *see infra* § [5.56](#).
5. Rights are limited in cases involving suspected terrorists.

D. Procedure [§ 5.223]

1. Notice to Appear (removal papers) served on alien in person or by certified mail. 8 [U.S.C.](#) § 1229.
 - a. Notice provides alien with information on time and place of proceedings and nature of charge.
 - b. Notice must be served on alien at least 10 days before hearing to provide alien opportunity to obtain counsel unless alien requests earlier date in writing.
2. Removal hearing is held before immigration judge (for Wisconsin residents, in Chicago, unless alien is in custody and is transferred to another holding facility). 8 [U.S.C.](#) § 1229a.
3. Arraignment-type hearing may precede actual hearing.
 - a. Immigration judge will notify alien of rights, *see supra* § [5.55](#).
 - b. Alien will be provided time to apply for relief from removal, *see infra* § [5.57](#).

E. Strategies for Avoiding or Preventing Removal [§ 5.224]

1. Alien may apply for adjustment of status (permanent residence). 8 [U.S.C.](#) § 1255.
 - a. Application must be made before immigration judge.
 - b. Alien may apply only if alien is otherwise eligible for permanent residence (e.g., through marriage to U.S. citizen).
2. Cancellation of removal. 8 [U.S.C.](#) § 1229b; 8 [C.F.R.](#) §§ 1240.20–.21.
 - a. Purpose of cancellation is to alleviate hardship on aliens who have established roots while in U.S.; results in termination of removal process; if cancellation is granted, alien may apply for permanent residence or remain in U.S. if already a permanent resident.

- b. Statutory prerequisites
 - (1) For permanent residents. 8 [U.S.C.](#) § 1229b(a).
 - (a) Permanent resident for five years
 - (b) Continuous presence in U.S. for seven years after admission in any status
 - (c) Have not been convicted of aggravated felony
 - (2) For nonpermanent residents. 8 [U.S.C.](#) § 1229b(b).
 - (a) Continuous presence in U.S. for 10 years preceding application (3 years for battered spouse or child)
 - (b) Good moral character during period of required physical presence
 - (c) Showing that removal would impose exceptional and extremely unusual hardship on the alien or permanent resident or on the alien's U.S. citizen spouse, child, or parent
 - (d) Have not been convicted of aggravated felony
- 3. Waiver of removability. 8 [U.S.C.](#) § 1227(a)(1)(E)(iii).
- 4. Voluntary departure, whereby alien agrees to leave U.S. within specified period of time. 8 [U.S.C.](#) § 1229c.

NOTE: Voluntary departure is the preferable option if the alien has no other basis for relief.

 - a. Maximum period of voluntary departure is 120 days if requested before merits hearing is set and 60 days upon completion of removal hearing.
 - b. Future reentry into U.S. will be easier than if alien is removed.
 - c. Alien may select destination for removal.
 - d. Arriving aliens, aggravated felons, and terrorists are not eligible for voluntary departure.
 - e. Failure to depart U.S. after grant of voluntary departure can lead to additional penalties.
- 5. Registry, *see supra* § [5.33](#).
- 6. Seeking protection, *see supra* §§ [5.46–.51](#).
- 7. TPS. 8 [U.S.C.](#) § 1254a; *see supra* § [5.51](#).
 - a. Attorney General designates particular nationalities for eligibility for TPS for a specific limited time (which may be extended).

- b. Countries selected for TPS are often countries suffering from civil war or natural disasters.

X. CITIZENSHIP AND NATURALIZATION [§ 5.225]

A. Citizenship Pathways in General [§ 5.226]

1. At birth in the U.S. or its territories. 8 [U.S.C.](#) § 1401(a); 8 [U.S.C.](#) § 1402; *see also* 8 [U.S.C.](#) § 1101(38).
2. At birth outside the U.S. to at least one U.S. citizen parent who satisfies U.S. residency requirements. 8 [U.S.C.](#) § 1401(c), (d), (e), (g), (h).
3. Being found as an orphan in the U.S. before turning five years old. 8 [U.S.C.](#) § 1401(f).
4. After fulfilling certain residency, age, moral character, English language, U.S. civics knowledge, U.S. history knowledge, and physical-presence requirements in lawful permanent residence status. 8 [U.S.C.](#) § 1427.
5. Being in the legal, physical custody of at least one U.S. citizen parent while physically residing in the U.S. in lawful status. 8 [U.S.C.](#) § 1431; 8 [U.S.C.](#) § 1433. Requirement of physical residence in the U.S. is deemed satisfied even if child is outside of U.S. if child is living in legal custody of U.S. government employee or member of U.S. Armed Forces stationed abroad.
6. Service in the U.S. armed services. 8 [U.S.C.](#) § 1439.

B. Bases for Citizenship at Birth [§ 5.227]

1. Birth in geographical U.S. or U.S. territory. 8 [U.S.C.](#) § 1401(a); 8 [U.S.C.](#) § 1402.
2. Birth abroad to U.S. citizen parent(s). 8 [U.S.C.](#) § 1401(c), (d), (e), (g), (h); 8 [U.S.C.](#) § 1403.
 - a. Eligibility varies greatly, depending on
 - (1) Date of birth
 - (2) Citizenship status of parent(s) at birth
 - (3) Citizen parent(s) period of residence in the U.S. or U.S. possession
 - (4) Duration of residence or physical presence in the U.S.
 - (5) Marital status of U.S. citizen parent(s) at birth
 - b. Depending on birth date, alien making claim to citizenship by birth to U.S. citizen parent(s) may also have been required to reside in U.S. before reaching certain age. U.S. residence requirement does not apply to any child born abroad to at least one U.S. citizen parent on or after October 10, 1952.
 - c. Presently, a child born abroad automatically acquires U.S. citizenship at birth under any of the following circumstances:

- (1) Both of the child's parents are U.S. citizens and at least one parent had an established residence in the U.S. or in a U.S. possession at the time of the child's birth. 8 [U.S.C. § 1401\(c\)](#).
 - (2) At least one of the child's parents is a U.S. citizen who lived in the U.S. for at least one continuous year before child's birth. 8 [U.S.C. § 1401\(d\)](#).
 - (3) At least one of the child's parents is a U.S. citizen who, before the child's birth, physically resided in the U.S. or a U.S. possession for a total of five years, two of which were after the parent turned 14 years old. 8 [U.S.C. § 1401\(g\)](#).
 - (4) Child's father is a U.S. citizen who meets previous U.S. residency requirements, was a citizen at time of child's birth, has agreed in writing to provide financial support to child before child's 18th birthday, and either voluntarily admits paternity or is adjudicated as the father. 8 [U.S.C. § 1409\(a\), \(b\)](#). *But see Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020) (appeal dismissed) (holding unconstitutional 8 [U.S.C. § 1409\(c\)](#)).
3. All U.S. citizens are U.S. nationals, but not all nationals are citizens. 8 [U.S.C. § 1408](#).
 4. Documentation of U.S. citizenship at birth includes
 - a. Evidence of birth in U.S.,
 - b. Report of Birth Abroad from U.S. consulate or embassy (Form FS-240), or
 - c. U.S. passport.

C. Derivation of Citizenship [§ 5.228]

Child automatically derives U.S. citizenship. 8 [U.S.C. § 1431](#).

1. At least one parent is a U.S. citizen by birth or naturalization; and
2. When parent becomes U.S. citizen, child is
 - a. Under age 18,
 - b. Unmarried,
 - c. In lawful permanent resident status, and
 - d. Residing physically in the U.S. in the legal and physical custody of the citizen parent.

D. Naturalization Requirements [§ 5.229]

1. Continuous lawful permanent resident status before application for naturalization
 - a. Five-year requirement for permanent residents. 8 [U.S.C. § 1427\(a\)\(1\)](#).

- b. Three months of continuous residence, immediately before filing of application, in state in which application is filed. 8 [U.S.C.](#) § 1427(a)(1).
 - c. Continuous residence in U.S. between time application is filed and time citizenship is conferred. 8 [U.S.C.](#) § 1427(a)(2).
 - d. An absence from the U.S. for six continuous months or more may break the continuity of residence. 8 [U.S.C.](#) § 1427(b).
 - e. Shorter, three-year period applies for spouses of U.S. citizens who acquired their permanent resident status through their U.S. citizen spouse. 8 [U.S.C.](#) § 1430(a).
 - f. Exception exists for certain spouses of U.S. citizens employed abroad by U.S. government or a U.S. entity as well as for employees of certain nonprofit media outlets. 8 [U.S.C.](#) § 1430(b), (c).
2. Continuous physical presence in U.S. during applicable five- or three-year residency period. 8 [U.S.C.](#) § 1427(c).
 - a. One-half of residence requirement period
 - b. May use cumulative physical presence during applicable look-back period
 - c. Exception applies for certain employees or contractors of U.S. government as well as certain religious workers. 8 [U.S.C.](#) § 1427(c); 8 [U.S.C.](#) § 1428.
 3. English language ability. Must have understanding of English language, including the ability to read, write, and speak words in ordinary usage (requirement may be waived in certain circumstances). 8 [U.S.C.](#) § 1423(a)(1).
 4. Knowledge of American history and government. Must demonstrate basic knowledge and understanding of the fundamentals of U.S. history as well as the principles and format of the government in the U.S. (requirement may be waived in certain circumstances). 8 [U.S.C.](#) § 1423(a)(2).
 5. Maintenance of good moral character during applicable residency period. 8 [U.S.C.](#) § 1427(d).
 6. Attachment to the principles of the Constitution, democracy, and good order of the U.S. Individuals are precluded from naturalization if they are opposed to the basic democratic constitutional government of the U.S., seek to change the U.S. government through nonpeaceful means, or seek to establish communism or a totalitarian government within the U.S. 8 [U.S.C.](#) § 1424(a).
 7. Must be at least 18 years old. 8 [U.S.C.](#) § 1445(b).
- NOTE: Certain exceptions exist for members of the U.S. armed forces, 8 [U.S.C.](#) § 1440(b), and certain minor children acquiring citizenship through their U.S. citizen parent, 8 [U.S.C.](#) § 1433.
8. Child under age 18 may be naturalized if

- a. At least one parent of the child (or, if the citizen parent has died during the preceding 5 years, a citizen grandparent or citizen legal guardian) is a U.S. citizen by birth or naturalization;
- b. Citizen parent lived in U.S. for at least 5 years, 2 years of which were after the age of 14, or the parent of a citizen parent lived in the U.S. for a total of 5 years, 2 years of which were after the age of 14;
- c. Child is under age 18 until naturalization process is complete;
- d. Child is unmarried;
- e. Child is residing outside U.S. in legal and physical custody of citizen parent; and
- f. Child is temporarily physically present in U.S. pursuant to lawful admission and remains in lawful status until naturalization process is complete. 8 [U.S.C.](#) § 1433.

E. Naturalization Application Procedure [§ 5.230]

See 8 [U.S.C.](#) § 1445(d); CIS Form N-400.

1. File application at CIS Regional Service Center (may be filed up to three months before date applicant has fulfilled residency requirements).
2. Attend interview with local CIS office. 8 [U.S.C.](#) § 1446.

Includes review and verification of application, English language proficiency examination (oral and written), and U.S. civics-government and history exam.

3. Attend swearing-in ceremony. Citizenship oath may be administered by CIS or in federal district court.

F. Appeal of Denials [§ 5.231]

1. Applicant may request administrative hearing before immigration officer other than officer who issued denial. 8 [U.S.C.](#) § 1447(a).
2. De novo review of final administrative denial may be sought in federal district court. 8 [U.S.C.](#) § 1421(c).

XI. ADMINISTRATIVE AND JUDICIAL REVIEW [§ 5.232]

A. In General [§ 5.233]

1. Certain CIS decisions are reviewable either administratively or judicially.
2. Aliens may seek judicial review of certain decisions after exhausting administrative remedies.

3. Appeal timely filed, but to improper forum, can result in loss of appeal rights (address to where administrative appeal must be filed is usually provided with decision that denies requested benefit).
4. Some decisions are not subject to administrative or judicial review (e.g., those affecting applications for issuance or extensions of temporary visas); other than possibly motion to reopen/reconsider, alien has no appeal rights in these situations.
5. Reviewing entities
 - a. BIA, *see infra* § [5.67](#).
 - b. CIS Administrative Appeals Office (AAO), *see infra* § [5.67](#).
 - c. Federal courts, *see infra* § [5.67](#).

B. Appealable Decisions [§ 5.234]

1. BIA. *See* 8 [C.F.R.](#) §§ 1003.1–8.
 - a. Decisions of immigration judges in removal or asylum proceedings
 - b. Decisions regarding family-based immigrant (permanent resident) visas
 - c. Fines and penalties
 - d. Bond and detention
2. AAO. *See* 8 [C.F.R.](#) § 103.3.
 - a. Decisions regarding most employment-based immigrant and nonimmigrant petitions
 - b. Decisions regarding immigrant petitions for special immigrants and entrepreneurs
 - c. Decisions regarding denial of adjustment status applicants for certain special immigrants
 - d. Decisions regarding temporary protected status
 - e. Decisions regarding fiancé(e) petitions and certain family-based petitions
 - f. Decisions regarding applications for a waiver of certain grounds of inadmissibility
 - g. Decisions regarding applications to reapply for admission after deportation
 - h. Decisions regarding orphan petitions
 - i. Decisions regarding applications for certain citizenship or naturalization papers and benefits

- j. Decisions regarding T and U visa applications and petitions
 - k. Decisions regarding certain travel documents
 - l. Decisions regarding certain legalization applications
 - m. Decisions regarding applications for certain grounds of excludability, including waivers of two-year foreign residency requirement pursuant to 8 [U.S.C.](#) § 1182(e)
 - n. Decisions involving CIS Service Center decisions to revoke certain previously approved petitions
3. Judicial review. 8 [U.S.C.](#) § 1252(a), (b).
- a. Decisions on applications for citizenship filed in district court
 - b. Final order of removal and asylum filed in federal circuit court of appeals
 - c. Federal courts have been generally stripped of their ability to review most immigration matters.
 - d. Appeals to courts generally limited to final orders when all administrative remedies have been exhausted.
4. Board of Alien Labor Certification Appeals (BALCA). 20 [C.F.R.](#) § 656.26.
- Denials of alien labor certification applications

C. Nonappealable Decisions [§ 5.235]

- 1. Consular visa decisions. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).
- 2. Final orders of removal and Attorney General's discretionary grant or denial of certain forms of relief or waivers under the INA. 8 [U.S.C.](#) § 1252(a), (b).
- 3. Attorney General's discretionary decision to commence proceedings, adjudicate cases, or execute removal orders against any alien. 8 [U.S.C.](#) § 1252(g).

XII. WORKPLACE COMPLIANCE [§ 5.236]

A. Employment Authorization Verification [§ 5.237]

- 1. U.S. employers can only recruit, refer for a fee, hire, or continue to employ persons who are authorized to work in the U.S. 8 [U.S.C.](#) § 1324a(a)(1), (2).
- 2. It is unlawful for any employer to obtain or use the labor of an alien in the U.S., including an alien who is an independent contractor, knowing that the alien is an unauthorized alien. 8 [U.S.C.](#) § 1324a(a)(1), (4); 8 [C.F.R.](#) § 274a.3; 8 [C.F.R.](#) § 274a.5.

- a. *Hire*—Actual commencement of employment of an employee for wages or other remuneration after November 6, 1986. 8 [C.F.R.](#) § 274a.1(c).
 - b. *Employment*—Any service or labor by an employee within the U.S., but does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent. 8 [C.F.R.](#) § 274a.1(h).
 - c. *Employee*—An individual who provides services or labor for an employer for wages or other remuneration; does not include independent contractors. 8 [C.F.R.](#) § 274a.1(f).
 - d. *Unauthorized alien*—An alien who at the time of recruitment, referral, hire, or continued employment is not a lawful permanent resident or authorized by the law or the government to work lawfully within the U.S. 8 [C.F.R.](#) § 274a.1(a).
 - e. *Independent contractor*—An individual who carries out business or work according to own means and methods and is subject to control only to the results. 8 [C.F.R.](#) § 274a.1(j).
 - f. *Knowing*—Includes both actual and constructive knowledge. 8 [C.F.R.](#) § 274a.1(l)(2).
 - (1) *Constructive knowledge*—Includes knowledge that, it may be inferred, a person using reasonable care would know.
 - (2) Does not include inference by an individual’s foreign appearance or accent. 8 [C.F.R.](#) § 274a.1(l)(2).
3. All employers must verify that employees hired after November 6, 1986, are authorized to work in the U.S. and have also established their identities using Form I-9, Employment Eligibility Verification.
- a. Section 1 of Form I-9 must be completed by employee no later than the first day of employment (i.e., first day of paid work). 8 [C.F.R.](#) § 274a.2(b)(1)(i)(A).
 - b. Section 2 of Form I-9 must be completed by employer within three business days after employee’s first day of employment. 8 [C.F.R.](#) § 274a.2(b)(1)(ii)(B).
 - (1) If hired employee’s duration of employment will be less than three business days, then must complete Section 2 on date of hire. 8 [C.F.R.](#) § 274a.2(b)(1)(iii).
 - (2) Employer, or its designated agent, must physically examine original document(s) presented by employee to establish identity and work eligibility to ensure that document(s) appear genuine and are related to employee. 8 [C.F.R.](#) § 274a.2(b)(1)(ii)(A).
 - c. Section 3 of Form I-9 must be completed if an employee’s employment authorization is subject to expiration. 8 [C.F.R.](#) § 274a.2(b)(1)(vii).
 - (1) Reverification must be performed timely to ensure Form I-9 reflects employee’s continuing authorization to work lawfully in the U.S. 8 [C.F.R.](#) § 274a.2(b)(1)(vii).
 - (2) Employment must immediately cease for any alien who is no longer authorized to work lawfully in the U.S. 8 [C.F.R.](#) § 274a.2(b)(1)(vii).

- d. Employers must retain a completed Form I-9 for all current employees hired after November 6, 1986, and then, once the employee is no longer employed, for the later of an additional three years after the date of hire or one year from the date the employee's employment ended. 8 [U.S.C.](#) § 1324a(b)(3); 8 [C.F.R.](#) § 274a.2(b)(2)(i)(A).

NOTE: Recruiters and referrers for a fee only need to retain for three years after date of hire.

- (1) Employers must make all retained Form I-9s available for government inspection. 8 [C.F.R.](#) § 274a.2(b)(2)(ii).
 - (2) The federal government need not obtain a subpoena or warrant to inspect an employer's Form I-9s, but employer must be provided with notice at least three business days before having to produce its Form I-9s for inspection. 8 [C.F.R.](#) § 274a.2(b)(2)(ii).
- e. Good-faith attempt to comply with Form I-9 rules entitles employer to an affirmative defense that it did not knowingly recruit, refer, hire, or continue to employ an unauthorized alien. 8 [U.S.C.](#) § 1324a(a)(3); 8 [C.F.R.](#) § 274a.4.
- 4. Errors or omissions with regard to the completion, maintenance, or retention of Form I-9s may lead to civil fines. 8 [U.S.C.](#) § 1324a(e)(5); 8 [C.F.R.](#) § 274a.10(b)(2).
 - 5. Knowingly engaging in the recruitment, referral for a fee, hire, or continued employment of an alien not authorized to work legally in the U.S. may result in civil fines, cease and desist order, compliance order, criminal fines, or imprisonment. 8 [U.S.C.](#) § 1324a(e)(4), (f).
 - a. Criminal penalties are possible for engaging in pattern and practice of hiring, recruiting, or referring for employment unauthorized alien(s). 8 [C.F.R.](#) § 274a.10.
 - b. *Pattern and practice*—Regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts. 8 [C.F.R.](#) § 274a.1(k).
 - c. Enhanced criminal fines and terms of imprisonment of up to five years exist for employers who within a 12-month period knowingly hire at least 10 individuals with actual knowledge that the employees are unauthorized aliens and were brought into the U.S. without prior authorization or through a place other than a designated border crossing. 8 [U.S.C.](#) § 1324(a)(3).

B. Employment Rights and Protections Against Immigration-Related Discrimination [§ 5.238]

- 1. Pursuant to Immigration Reform and Control Act of 1986 (IRCA), employers may not engage in unfair immigration practices against any individual (other than an unauthorized alien) with regard to their recruitment, hire, referral for a fee, or continued employment. 8 [U.S.C.](#) § 1324b(a).
- 2. Unfair immigration practices include the following:
 - a. National-origin discrimination against any individual or citizenship-status discrimination against a protected individual, unless an exemption applies. 8 [U.S.C.](#) § 1324b(a)(1).

- (1) Exemptions exist for
 - (a) Employers of three or fewer employees
 - (b) Employers covered under section 703 of the Civil Rights Act of 1964
 - (c) Citizenship-status discrimination that is required to comply with law, regulation, executive order; federal, state, or local government contract; or that is determined by U.S. Attorney General to be essential for doing business with the government
- (2) Under 8 [U.S.C. § 1324b\(a\)\(3\)](#), *protected individuals* include
 - (a) U.S. citizens and nationals
 - (b) Aliens admitted for permanent resident status, if they have timely pursued their eligibility to be naturalized
 - (c) Aliens admitted for temporary residence under a legalization program
 - (d) Refugees
 - (e) Asylees

NOTE: Unauthorized aliens and aliens lawfully present in the U.S. in a temporary nonimmigrant status are therefore not protected by IRCA's provision against citizenship-status discrimination because they are not protected individuals.

- b. National-origin discrimination refers to practices that treat certain persons differently based on their country of birth, the place from which their ancestors came, or their ethnic group.
 - (1) All individuals except unauthorized aliens are protected from national-origin discrimination.
 - (2) National-origin discrimination can include less favorable treatment against a person for the following reasons:
 - (a) The person is not a member of a particular ethnic group;
 - (b) The person's physical, linguistic, or cultural characteristics are closely associated with a national origin group, such as discrimination against someone based on traditional ethnic style of dress;
 - (c) A perception or belief that a person is a member of a particular national origin group based on such things as speech, mannerisms, or dress, regardless of whether the person identifies himself or herself as a member of a group or originates, in fact, from the perceived ethnicity; or

- (d) An accent, if the accent does not interfere with the individual's job performance. U.S. EEOC, *EEOC Enforcement Guidance on National Origin Discrimination* (Nov. 18, 2016), <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination>.
- c. Document abuse or overdocumentation during the Form I-9 process with purpose or intent to discriminate is also an unfair immigration practice. 8 [U.S.C.](#) § 1324b(a)(6). Document abuse or overdocumentation may be found when an employer
 - (1) Requests more documents than required by law to complete the Form I-9 process,
 - (2) Rejects valid documents presented by an employee to complete Form I-9 and instead requests specific documents preferred by the employer, or
 - (3) Requests an employee to present work authorization documents more often than required.
- d. Employers may prefer to hire, recruit, or refer for a fee U.S. citizens and nationals over an alien if the two individuals are equally qualified. 8 [U.S.C.](#) § 1324b(a)(4).
 - (1) IRCA does not require an employer to hire a U.S. employee over an equally qualified non-U.S. worker who is authorized for employment in the U.S.
 - (2) When an employer hires a foreign national holding a work-authorizing status rather than a U.S. citizen who is protected individual, this may constitute citizenship-status discrimination if the reason for the choice is the foreign national worker's citizenship status.
- e. Actionable discrimination under IRCA's antidiscrimination provisions must be intentional conduct, not merely treatment that has the effect of being discriminatory. *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, at *20 (Apr. 15, 2003), <https://www.justice.gov/sites/default/files/eoir/legacy/2003/05/09/1095.pdf>.
 - (1) Claimant must show that an employer knowingly and intentionally treated the injured party less favorably than other similarly situated individuals. Citizenship-status discrimination refers to the concept of treating individuals differently based on their immigration status.
 - (2) To establish a prima facie case of citizenship-status or national-origin discrimination in hiring, all the following must be shown:
 - (a) The applicant is a member of a protected class.
 - (b) The applicant suffered an adverse employment action.
 - (c) The applicant was qualified for the position.
 - (d) The position remained open or was filled by similarly qualified applicants outside the protected class.

- f. Engaging in unfair immigration practices may result in cease and desist order, compliance order, civil fines, back pay, front pay, attorney fees, order to rehire, debarment from federal programs, or other penalties. 8 [U.S.C.](#) § 1324b(g).
3. In contrast to IRCA, Title VII of the Civil Rights Act of 1964, as amended, does not exclude from protection individuals who are unlawfully present in the U.S. or not authorized by the immigration laws to be employed in the U.S.
 - a. Title VII prohibits employers from discriminating because of a person's race, color, religion, sex, or national origin. 42 [U.S.C.](#) § 2000e-2(a).
 - b. Title VII does not prohibit discrimination based on citizenship or alienage. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).
 - c. Title VII applies to employers with 15 or more employees on the payroll each working day for 20 or more weeks during the current or preceding year. 42 [U.S.C.](#) § 2000e-(b).
 - d. Title VII does not apply to the employment of aliens outside the U.S. or to religious corporations, associations, educational institutions, or societies. 42 [U.S.C.](#) § 2000e-1(a).
 - e. Title VII covers discriminatory practices relating to all employment decisions, such as hiring, discharge, compensation, wage, benefits, promotions, and training. 42 [U.S.C.](#) § 2000e-2(a).
 - f. Prohibited conduct under Title VII includes both intentional discriminatory treatment as well as nonintentional practices that have a discriminatory effect on employees. 42 [U.S.C.](#) § 2000e-2(k); 42 [U.S.C.](#) § 2000e-2(m).
 - g. Claims under Title VII may proceed on either of two theories. 42 [U.S.C.](#) § 2000e-2(k).
 - (1) *Disparate treatment*—An employer knowingly and intentionally treated the injured party less favorably than other similarly situated individuals.
 - (2) *Disparate impact*—Discrimination resulted from the employer's practices that, although facially neutral, nevertheless had a significant impact on the protected group.
4. Aliens working in the U.S., whether with or without authorization, are considered employees under the National Labor Relations Act. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144–45 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).
5. Federal minimum-wage and overtime-pay requirements generally apply to both authorized and undocumented workers and therefore such workers may seek to recover wages for work performed regardless of their immigration status. See *Cortez v. Medina's Landscaping*, No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) (unpublished) (denying defendant employer's motion to compel discovery regarding plaintiff's immigration status, since plaintiff would still be protected by the Fair Labor Standards Act in action seeking wage recovery for hours actually worked, regardless of whether plaintiff was undocumented).

Chapter 6

Appellate Procedure

Michael S. Heffernan

Madison

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Mar. 17, 2022, and to Wisconsin court of appeals forms, as updated through July 2021.

I. INTRODUCTION [§ 6.239]

A. In General [§ 6.240]

The Wisconsin appellate system is a two-tiered system with the court of appeals as the error-correcting court and the supreme court as the law-making court.

B. Additional Resource [§ 6.241]

For a detailed practice and procedure book, see Michael S. Heffernan, [Appellate Practice and Procedure in Wisconsin](#) (State Bar of Wis. 9th ed. 2022) [hereinafter [Heffernan](#)].

II. JURISDICTION OF WISCONSIN APPELLATE COURTS [§ 6.242]

A. Wisconsin Court of Appeals [§ 6.243]

1. Appellate jurisdiction—two varieties. Wis. Const. art. VII, § 5(3); 752.01(1); [Heffernan](#), *supra* § 6.3, § 2.3; *see also* Earl H. Hazeltine, *Jurisdiction of the Wisconsin Court of Appeals*, 69 Marq. L. Rev. 545 (1986).
 - a. Mandatory: Appeal as of right from a final order or judgment of circuit court. [Wis. Stat.](#) § 808.03(1).
 - b. Discretionary: Appeal by permission of court from a nonfinal order or judgment of circuit court, [Wis. Stat.](#) § 808.03(2).
2. Supervisory jurisdiction over all state actions and proceedings in all courts except the supreme court. Wis. Const. art. VII, § 5(3); [Wis. Stat.](#) § 752.02; [Heffernan](#), *supra* § 6.3, § 2.4.
3. Original jurisdiction is limited to issuance of prerogative or supervisory writs, e.g., mandamus or prohibition. Wis. Const. art. VII, § 5(3); [Wis. Stat.](#) § 752.01(2); *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87 (1986); [Heffernan](#), *supra* § 6.3, § 2.4.

B. Wisconsin Supreme Court [§ 6.244]

1. Discretionary appellate jurisdiction only. Wis. Const. art. VII, § 3(2); [Wis. Stat.](#) § 751.05; [Heffernan](#), *supra* § [6.3](#), § 2.6.
 - a. Review of final court of appeals order or judgment. Wis. Const. art. VII, § 3(3); [Wis. Stat.](#) § 808.10.
 - b. Bypass (removing case from court of appeals). Wis. Const. art. VII, § 3(3); [Wis. Stat.](#) § 808.05.
2. Supervisory jurisdiction. Wis. Const. art. VII, § 3(1); [Heffernan](#), *supra* § [6.3](#), § 2.7.
3. Original jurisdiction, including over matters that the court determines to be of great public importance. Wis. Const. art. VII, § 3(2); [Heffernan](#), *supra* § [6.3](#), § 2.7.

III. ELECTRONIC FILING (E-FILING) [§ 6.245]

A. Circuit Court [§ 6.246]

1. All circuit court filings must be e-filed except in cases involving unrepresented parties or certain agents of low-volume filers. [Wis. Stat.](#) § 801.18; [Heffernan](#), *supra* § [6.3](#), § 5.14.
2. Examples of appeal-related documents that may need circuit court e-filing include notice of appeal, docketing statement, statement on transcript, motions for three-judge panel or for hearing in county of origin, and notice of intent to seek postdisposition relief. [Heffernan](#), *supra* § [6.3](#), § 18.3.

B. Appellate Court [§ 6.247]

1. As in the circuit court, all court of appeals filings, except those by self-represented parties and certain agents of low-volume filers, must be e-filed. [Wis. Stat.](#) § 809.801; [Heffernan](#), *supra* § [6.3](#), § 18.3. Unless otherwise noted, this chapter generally sets forth the e-filing rules for parties represented by counsel.
2. Supreme Court e-filing is being phased in as part of a pilot project. *See* Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021); [Heffernan](#), *supra*, § [6.3](#), ch. 23.

IV. APPEAL AS OF RIGHT TO COURT OF APPEALS [§ 6.248]

A. Determine Whether Order or Judgment Final [§ 6.249]

See generally [Heffernan](#), *supra* § [6.3](#), ch. 4.

1. Final order or judgment must be
 - a. In writing. *Ramsthal Advert. Agency v. Energy Miser, Inc.*, 90 Wis. 2d 74, 75 (Ct. App. 1979).

- b. Entered (filed) by the clerk of circuit court or recorded in docket entry if a disposition in [Wis. Stat.](#) ch. 799 case or traffic-regulation or municipal-ordinance violation case. [Wis. Stat.](#) § 808.03(1).
 - c. A disposition that explicitly dismisses or adjudges the entire matter in litigation as to one or more parties. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 34, 299 Wis. 2d 723.
2. Three exceptions to rule of finality (disposition of entire matter): Orders suspending or restraining enforcement of a state statute, orders or judgments relating to an electronics and information technology manufacturing zone, and orders granting or denying class-action certifications or decertifications are immediately appealable. [Wis. Stat.](#) §§ 809.104(2), 813.025(3), 803.08(11).

B. Determine Time for Appeal [§ 6.250]

See generally [Wis. Stat.](#) § 808.04; [Heffernan](#), *supra* § 6.3, §§ 5.2–7.

1. General rule: Ordinary civil appeals must be initiated
 - a. Within 90 days after entry of judgment or order, [Wis. Stat.](#) § 808.04(1);
 - b. Within 45 days after entry of final judgment or order *if the other party has given (served) notice of entry, id.*, which
 - (1) Must be in writing, be given after entry, and contain correct date of entry, *see* [Wis. Stat.](#) § 806.06(3);
 - (2) Must be given no later than 21 days after entry of judgment, *see* [Wis. Stat.](#) § 806.06(5); and
 - (3) Must be a formal, captioned, signed document; a copy of order or judgment cannot serve as notice of entry, *Soquet v. Soquet*, 117 Wis. 2d 553 (1984); or
 - c. Within 90 days after denial of motion for reconsideration, if motion was timely filed within 20 days after entry of appealable order or judgment, [Wis. Stat.](#) § 805.17(3).

NOTE: Time to appeal is always measured from the date of entry of the order or judgment, not from the date of service of notice of entry. *Soquet*, 117 Wis. 2d at 561.

2. Other appeal periods
 - a. Appeals in proceedings under [Wis. Stat.](#) § 971.17, in criminal cases, and in cases under [Wis. Stat.](#) chs. 48 (except TPR, parental-consent-to-abortion, and child-guardianship cases), 51, 55, 938, and 980. [Wis. Stat.](#) §§ 808.04(3), 809.30(1)(a); *see infra* §§ 6.29–39.
 - b. State’s appeal in proceedings under [Wis. Stat.](#) § 971.17, in criminal cases, and in cases under [Wis. Stat.](#) chs. 48, 938, and 980: 45 days from entry. [Wis. Stat.](#) § 808.04(4).
 - c. Appeals in evictions and cases challenging state law in federal court: 15 days. [Wis. Stat.](#) § 808.04(2).

- d. Death of party before appeal: 120 days after death or time provided by law, whichever is later. [Wis. Stat.](#) § 808.04(6).
- e. Appeals by parties other than state in adoption cases: 40 days. [Wis. Stat.](#) § 808.04(7).
- f. Appeals in termination-of-parental-rights cases: 30 days. [Wis. Stat.](#) § 808.04(7m).
- g. Appeals in certain public records matters: 20 days. [Wis. Stat.](#) § 808.04(1m).
- h. Appeals in electronics and information technology manufacturing zone cases: 30 days. [Wis. Stat.](#) § 808.07(7p).
- i. Appeals of orders granting or denying class-action certifications or decertifications: 14 days. [Wis. Stat.](#) § 803.08(11).

C. Commence Appeal [§ 6.251]

1. Draft notice of appeal. [Wis. Stat.](#) § 809.10(1)(a), (b); [Heffernan](#), *supra* § 6.3, §§ 5.8–12.
 - a. Specify the judgment or order appealed from.
 - (1) Identify circuit court, date of entry, and circuit court case number. [Wis. Stat.](#) § 809.10(1)(b)1., 2.
 - (2) Use circuit court caption to identify parties.
 - b. State whether the appeal is to one judge or three, and whether it is entitled to statutory preference. [Wis. Stat.](#) § 809.10(1)(a)3., 4.
2. Serve notice of appeal by traditional means on paper parties (self-represented parties and agents for low-volume filers); otherwise, e-filing constitutes service. [Wis. Stat.](#) §§ 809.80(2), 809.801(4)(c); [Heffernan](#), *supra*, § 6.3, § 18.3.
3. File notice of appeal and completed docketing statement with clerk of circuit court within the time set forth in [Wis. Stat.](#) § 808.04. [Wis. Stat.](#) § 809.10(1); [Heffernan](#), *supra* § 6.3, §§ 5.4, 5.14, 5.19.
 - a. Transmit \$195 filing fee payable to clerk of court of appeals along with local filing fee. Must be e-filed. [Wis. Stat.](#) §§ 809.11(1), 809.25(2)(a)1., 801.18(7); [Heffernan](#), *supra* § 6.3, § 5.20.
 - b. Circuit court clerk must forward copies of notice of appeal and docketing statement to court of appeals within three days after filing. [Wis. Stat.](#) § 809.104(2)(b).

D. Record on Appeal [§ 6.252]

1. Request transcripts. [Heffernan](#), *supra* § 6.3, § 7.2.

- a. File statement on transcript with the clerk of circuit court within 14 days after filing notice of appeal. [Wis. Stat.](#) § 809.11(4).
 - (1) Must state when transcripts were requested or state that no transcripts are necessary for appeal. [Wis. Stat.](#) § 809.11(4)(b).
 - (2) Must be signed by court reporter. [Wis. Stat.](#) § 809.11(7)(b).
 - (3) Must be served on all parties. [Wis. Stat.](#) §§ 809.11(4)(c) (service complete on filing), 809.80(2) (traditional service for paper parties).
 - b. Respondent may designate additional portions for transcription within 14 days after appellant files statement on transcript. [Wis. Stat.](#) § 809.11(5).
 - c. Transcript due 60 days after it is requested; burden of preparation, timely filing, and service of transcript is on the court reporter. [Wis. Stat.](#) § 809.11(7)(a).
2. Clerk of circuit court assembles and electronically transmits appeal record in court of appeals within 20 days after filing of transcript or, at latest, 90 days after filing of notice of appeal. [Wis. Stat.](#) § 809.15(4); [Heffernan](#), *supra* § 6.3, § 7.3.

E. Prepare Appellant's Brief [§ 6.253]

1. Limited to 50 pages using monospaced font or handwriting or 11,000 words if using proportional serif font. [Wis. Stat.](#) § 809.19(8)(c); [Heffernan](#), *supra* § 6.3, § 11.5.
2. Include certification that brief and appendix meet the format, length, and content requirements. [Wis. Stat.](#) § 809.19(8g); [Heffernan](#), *supra* § 6.3, § 11.16.
3. If paper filing, pages must be secured together in the top left corner. [Wis. Stat.](#) § 809.19(8)(b)4.; [Heffernan](#), *supra* § 6.3, § 11.2. See also section 6.47, *infra*, for interim procedures for supreme court documents during transition to e-filing.
4. Use the following format:
 - a. Tables of contents, cases, and authorities. [Wis. Stat.](#) § 809.19(1)(a); [Heffernan](#), *supra* § 6.3, § 11.10.
 - b. Statement of issues. [Wis. Stat.](#) § 809.19(1)(b); [Heffernan](#), *supra* § 6.3, § 11.11.
 - c. Statement on oral argument and publication. [Wis. Stat.](#) § 809.19(1)(c); [Heffernan](#), *supra* § 6.3, § 11.12.
 - d. Statement of case, procedural posture, disposition, and facts. [Wis. Stat.](#) § 809.19(1)(d); [Heffernan](#), *supra* § 6.3, § 11.13.
 - e. Argument—refer to parties by name rather than party designation, subject to confidentiality concerns. [Wis. Stat.](#) § 809.19(1)(e), (i); [Heffernan](#), *supra* § 6.3, § 11.14.
 - f. Conclusion. [Wis. Stat.](#) § 809.19(1)(f); [Heffernan](#), *supra* § 6.3, § 11.15.

- g. Appendix. [Wis. Stat.](#) § 809.19(2); [Heffernan, supra](#) § 6.3, § 11.18.
- h. White front cover. [Wis. Stat.](#) § 809.19(9); [Heffernan, supra](#) § 6.3, § 11.7.

F. Serve and File Appellant's Brief [§ 6.254]

1. File with the clerk of court of appeals no later than 40 days after date of *filing* of record. [Wis. Stat.](#) § 809.19(1); [Heffernan, supra](#) § 6.3, § 11.4.
2. A party represented by counsel must e-file the brief and appendix. E-filing must be done using the process set forth in [Wis. Stat.](#) § 809.801(6). [Wis. Stat.](#) § 809.19(8)(a)1.; [Heffernan, supra](#) § 6.3, § 18.3; *cf.* [Wis. Stat.](#) § 809.19(8)(a)2. (paper filing).
3. Service accomplished when e-filing occurs, [Wis. Stat.](#) § 809.801(4)(c), except paper parties (generally self-represented parties) must be served a paper copy by traditional means, [Wis. Stat.](#) §§ 809.801(3)(c), 809.80(2).

G. Prepare Respondent's Brief [§ 6.255]

See generally [Wis. Stat.](#) § 809.19(3), (8); [Heffernan, supra](#) § 6.3, § 11.21.

1. Limited to 50 pages if using monospaced font or handwriting or 11,000 words if using proportional serif font. [Wis. Stat.](#) § 809.19(8)(c); [Heffernan, supra](#) § 6.3, § 11.21.
2. Specifications and format are identical to appellant's brief, *see supra* § 6.15, except
 - a. Need not include statement of issues or statement of case, [Wis. Stat.](#) § 809.19(3)(a);
 - b. Appendix optional, [Wis. Stat.](#) § 809.19(3)(b); and
 - c. White cover, [Wis. Stat.](#) § 809.19(9).

H. Serve and File Respondent's Brief [§ 6.256]

1. File with clerk of court of appeals within the later of 30 days after *service* of appellant's brief, 30 days after appellant's brief is filed, or 30 days after the filing of the record in the court of appeals. [Wis. Stat.](#) § 809.19(3)(a), (8)(a); [Heffernan, supra](#) § 6.3, §§ 11.6, 11.20, 11.21.
2. A party represented by counsel *must* e-file the brief and appendix. E-filing must be done using the process set forth in [Wis. Stat.](#) § 809.801(6). [Wis. Stat.](#) §§ 809.19(8)(a)1.; [Heffernan, supra](#), § 6.3, § 18.3.
3. Service accomplished when e-filing occurs, [Wis. Stat.](#) § 809.801(4)(c), except paper parties (generally self-represented parties) must be served a paper copy by traditional means. [Wis. Stat.](#) § 809.801(3)(c).

I. Prepare, Serve, and File Reply Brief [§ 6.257]

1. Follow format and length specifications for appellant's brief, *see* [Wis. Stat.](#) § 809.19(8); *see also supra* § [6.15](#), except limit to 13 pages if using monospaced font or handwriting or 3,000 words if using proportional serif font, [Wis. Stat.](#) § 809.19(8)(c)2. For cover requirements, *see* [Wis. Stat.](#) § 809.19(9).
2. File with clerk of court of appeals the later of 15 days after *service* of respondent's brief or 15 days after respondent's brief is filed. [Wis. Stat.](#) § 809.19(4).
3. A party represented by counsel *must* e-file the brief. E-filing must be done using the process set forth in [Wis. Stat.](#) § 809.801(6). [Wis. Stat.](#) § 809.19(8)(a)1.
4. Service accomplished per procedure for appellant's and respondent's briefs noted above. *See supra* §§ [6.16](#), [6.18](#).

J. Briefs Filed by Parties Not Represented by Counsel of Record (Pro Se Briefs) [§ 6.258]

Any document (including a brief) filed by an unrepresented party but prepared with the aid of an attorney not of record must include a statement that the document was prepared with the assistance of a lawyer. [Wis. Stat.](#) § 802.05(2m); [Heffernan, supra](#) § [6.3](#), § 11.15. There is no requirement to identify the name or state bar number of the assisting attorney.

K. Multiple-Party Briefs [§ 6.259]

In appeals with more than one appellant or more than one respondent, the multiple appellants and respondents must observe rules designed to limit multiple, repetitious briefs. Notably, parties represented by the same counsel must file one joint brief. [Wis. Stat.](#) § 809.19(5); [Heffernan, supra](#) § [6.3](#), § 11.24.

L. Postdecision Procedures [§ 6.260]

1. Motion for reconsideration is allowed in both the court of appeals and the supreme court. [Wis. Stat.](#) §§ 809.24, 809.64; [Heffernan, supra](#) § [6.3](#), § 16.2.
 - a. File motion within 20 days after decision or order; length of motion and any response is limited to 5 pages if using monospaced font or handwriting or 1,100 words if using proportional serif font.
 - b. Court of appeals may reconsider, on its own motion, any time before remittitur or within 30 days after filing of petition for review.
2. Costs and fees are awarded to prevailing party. [Wis. Stat.](#) § 809.25; [Heffernan, supra](#) § [6.3](#), § 16.4.
 - a. File statement of costs within 14 days after the release of the court's decision. [Wis. Stat.](#) § 809.25(1)(c).
 - b. Costs and fees other than those specifically allowed by [Wis. Stat.](#) § 809.25(1)(b) are rarely awarded.

M. Relief Pending Appeal [§ 6.261]

NOTE: For an expanded discussion about relief pending appeal, see generally [Heffernan](#), *supra* § 6.3, ch. 14.

1. Appeal generally does not stay execution of the order or judgment on appeal. [Wis. Stat.](#) § 808.07(1).
2. Joint authority of circuit and appellate courts to grant relief. [Wis. Stat.](#) § 808.07(2).
 - a. Must first file motion in circuit court unless it is impractical to do so. [Wis. Stat.](#) § 809.12.
 - b. Adverse ruling in circuit court may be reviewed by further motion in appellate court. [Wis. Stat.](#) § 809.12.
3. Draft motion for relief to show the following interrelated factors, as stated in *Leggett v. Leggett*, 134 Wis. 2d 384, 385 (Ct. App. 1986):
 - a. Substantial injury will occur if the stay not granted,
 - b. Stay will not substantially injure other parties or the public, and
 - c. Movant has brought a meritorious appeal.

V. DISCRETIONARY OR PERMISSIVE APPEALS IN COURT OF APPEALS [§ 6.262]

NOTE: For an additional information about the criteria and procedure for discretionary or permissive appeals, see generally [Heffernan](#), *supra* § 6.3, ch. 9.

A. Nonfinal Orders or Judgments [§ 6.263]

May be appealed with permission of court by filing petition for leave to appeal within 14 days after the entry of order or judgment. [Wis. Stat.](#) §§ 808.03(2), 809.50(1).

B. Draft Petition for Leave to Appeal [§ 6.264]

1. Under [Wis. Stat.](#) § 809.50(1), petition must contain the following:
 - a. Statement of issues;
 - b. Statement of facts;
 - c. Statement showing that the
 - (1) Appeal will materially advance termination of litigation or clarify further proceedings,
 - (2) Appeal is necessary to protect petitioner from substantial or irreparable injury, *or*

- (3) Appeal would clarify issue of general importance in administration of justice. *See also* [Wis. Stat.](#) § 808.03(2).
2. Petition must address the merits of litigation and include circuit court's decision. *See* [Wis. Stat.](#) § 809.50(1)(d).
3. Petition must request temporary relief, if needed; provide facts, particularly dates, necessary to show the need for stay. [Wis. Stat.](#) § 809.52.
4. Petition and supporting memorandum, if any, must not exceed a combined total of 35 pages if using monospaced font or handwriting or 8,000 words if using proportional serif font. [Wis. Stat.](#) § 809.50(1).
5. Draft and file a certification of length with petition or response. [Wis. Stat.](#) § 809.50(4).

C. File and Serve Petition [§ 6.265]

1. E-file petition with the clerk of court of appeals within 14 days after entry of nonfinal order or judgment. [Wis. Stat.](#) §§ 809.50(1), 809.801(5)(d).
2. Serve one copy on each party. [Wis. Stat.](#) § 809.80(2).

D. File and Serve Response [§ 6.266]

1. Response and supporting memorandum, if any, must not exceed a combined total of 35 pages if using monospaced font or handwriting or 8,000 words if using proportional serif font. [Wis. Stat.](#) § 809.50(2).
2. E-file response with the clerk of court of appeals within 14 days after service of petition. [Wis. Stat.](#) §§ 809.50(2), 809.801; [Heffernan](#), *supra* § 6.3, § 18.3.
3. Serve on paper parties by traditional means. [Wis. Stat.](#) § 809.80(2).

VI. CRIMINAL AND OTHER APPEALS UNDER [WIS. STAT.](#) § 809.30 [§ 6.267]

NOTE: For an expanded discussion about appeals in criminal cases and other cases under [Wis. Stat.](#) § 809.30, see generally [Heffernan](#), *supra* § 6.3, ch. 19.

A. Introduction [§ 6.268]

Once notice of appeal is filed, criminal appeal or other appeal under [Wis. Stat.](#) § 809.30 proceeds just like any other appeal. These appeals are distinguished from civil appeals by series of steps that must precede filing of notice of appeal.

B. Receive Notice of Rights to Appeal and Representation (Criminal Cases Only) [§ 6.269]

1. At sentencing, circuit court judge personally informs defendant of the defendant's rights to postconviction relief and, if indigent, to representation by counsel. [Wis. Stat.](#) § 973.18(2); Form CR-233; [Heffernan](#), *supra* § 6.3, § 19.4.

2. Defense counsel must confer with defendant about postconviction rights and file form in circuit court indicating understanding of those rights. [Wis. Stat.](#) § 973.18(2), (4); [Heffernan](#), *supra* § 6.3, § 19.4.

C. File Notice of Intent to Pursue Postconviction or Postdisposition Relief [§ 6.270]

See generally [Heffernan](#), *supra* § 6.3, § 19.8.

1. Within 20 days after sentencing, notice of intent must be filed in circuit court and served on prosecutor and any other party. [Wis. Stat.](#) § 809.30(2)(b); [Heffernan](#), *supra* § 6.3, § 19.8.
2. Trial counsel must file notice unless discharged by person seeking relief or allowed to withdraw by circuit court before notice must be filed. [Wis. Stat.](#) §§ 973.18(5), 809.30(2)(a); [Heffernan](#), *supra* § 6.3, § 19.8.
3. Under [Wis. Stat.](#) § 809.30(2)(b), notice must contain the following:
 - a. Case name and number;
 - b. Identification of the order or judgment from which person will seek postconviction or postdisposition relief, and date granted or entered;
 - c. Name and address of person seeking relief and name and address of trial counsel;
 - d. Whether trial counsel was appointed, and if so, whether person's financial circumstances have materially improved;
 - e. Whether state public defender (SPD) postconviction or postdisposition representation is requested; and
 - f. If no SPD is requested, whether person will be represented by self or private counsel; identify any private counsel.

D. Circuit Court Clerk's Duties [§ 6.271]

See generally [Heffernan](#), *supra* § 6.3, § 19.9.

Under [Wis. Stat.](#) § 809.30(2)(c), within five days after filing notice of intent to pursue postconviction or postdisposition relief, circuit court clerk must do the following:

1. If SPD representation is requested, send SPD copy of notice, copy of judgment or order, list of all court reporters who worked on case, and list of those proceedings in which transcript has been filed in court record at counsel's request; and
2. If SPD representation is not requested, furnish person or counsel with copy of judgment or order, list of all court reporters, and list of those proceedings in which transcript has been filed in court record at counsel's request.

E. Redetermine Indigency [§ 6.272]

If a person represented by appointed counsel at trial requests SPD representation on appeal, district attorney may, within five days after service of notice of intent, request that SPD redetermine person's indigency; does not apply to child entitled to representation under [Wis. Stat.](#) § 48.23 or 938.23 or to adult entitled to representation under [Wis. Stat.](#) § 51.60(1) (Mental Health Act), [Wis. Stat.](#) § 55.105 (protective placement or services), or [Wis. Stat.](#) § 980.03(2)(a) (sexually violent person commitments). [Wis. Stat.](#) § 809.30(2)(d); [Heffernan](#), *supra* § 6.3, § 19.10.

F. Appoint Counsel [§ 6.273]

See generally [Heffernan](#), *supra* § 6.3, § 19.11.

1. If requested and appropriate, SPD must appoint counsel within 30 days after SPD receives materials from clerk under [Wis. Stat.](#) § 809.30(2)(c). [Wis. Stat.](#) § 809.30(2)(e).
2. If indigency must be redetermined, SPD must appoint counsel within 50 days after SPD receives materials from clerk under [Wis. Stat.](#) § 809.30(2)(c). [Wis. Stat.](#) § 809.30(2)(e).

G. Request Transcripts and Circuit Court Case Records [§ 6.274]

1. Transcripts and circuit court case records must be requested within 30 days after filing of notice of intent (extended to within 50 days after SPD receives materials from clerk of court under [Wis. Stat.](#) § 809.30(2)(c) if indigency must be determined or redetermined; extended to within 90 days after filing of notice of intent if SPD representation is sought and denied). [Wis. Stat.](#) § 809.30(2)(e), (f); [Heffernan](#), *supra* § 6.3, § 19.11.
2. Child appealing from [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938 judgment or order may receive free transcript on filing of affidavit. [Wis. Stat.](#) § 809.30(2)(fm).
3. Court reporter must file transcript and serve copy on defendant within 60 days after request. [Wis. Stat.](#) § 809.30(2)(g); [Heffernan](#), *supra* § 6.3, § 19.12.

H. File Appeal or Postconviction or Postdisposition Motion [§ 6.275]

See generally [Heffernan](#), *supra* § 6.3, §§ 19.13–16.

Within 60 days after the later of service of transcripts or circuit court record, person must either

1. File notice of appeal in circuit court, [Wis. Stat.](#) § 809.30(2)(h); or
2. File motion in circuit court for postconviction or postdisposition relief, *id.*
 - a. Circuit court must determine motion within 60 days or motion deemed denied. [Wis. Stat.](#) § 809.30(2)(i).
 - b. Person must file notice of appeal from judgment and, if necessary, from order on motion for postconviction or postdisposition relief within 20 days after entry of order on postconviction or postdisposition motion. [Wis. Stat.](#) § 809.30(2)(j).
 - c. Court reporter must file transcript of postconviction or postdisposition proceedings and serve copy on person within 20 days after request. [Wis. Stat.](#) § 809.30(2)(g).

I. Record Transmitted [§ 6.276]

Record must be transmitted to court of appeals no more than 40 days after filing notice of appeal; at this point, matter proceeds as in civil appeal. [Wis. Stat.](#) § 809.30(2)(k); [Heffernan, supra](#) § 6.3, § 19.15.

J. Release on Bond Pending Postconviction Relief [§ 6.277]

1. Release may be sought “upon appeal.” [Wis. Stat.](#) § 969.01(2)(b), (c).

Criminal appeals commence upon filing of notice of intent to pursue postconviction relief pursuant to [Wis. Stat.](#) § 809.30(2)(b).

2. Motion for release. [Heffernan, supra](#) § 6.3, § 19.20.
 - a. Prepare motion addressing the four conditions for release under [Wis. Stat.](#) § 809.31(3):
 - (1) No substantial risk that defendant will fail to appear;
 - (2) Defendant is not likely to commit serious crimes, intimidate witnesses, or hinder justice;
 - (3) Defendant will promptly prosecute postconviction proceedings; and
 - (4) Postconviction proceedings are not taken for purpose of delay.
 - b. File motion in circuit court. [Wis. Stat.](#) § 809.31(1).
 - c. Circuit court must promptly hold hearing and consider all relevant factors. [Wis. Stat.](#) § 809.31(2), (4).
3. Review of circuit court order. [Wis. Stat.](#) § 809.31(5); [Heffernan, supra](#) § 6.3, § 19.20.
 - a. File motion under [Wis. Stat.](#) § 809.14 in court of appeals within 21 days after entry of circuit court order.
 - b. Standard is erroneous exercise of discretion.
 - c. If erroneous exercise of discretion is found, matter is generally remanded for further hearing.

VII. ONE-JUDGE APPEALS [§ 6.278]

NOTE: For an expanded discussion about one-judge appeals, see generally [Heffernan, supra](#) § 6.3, ch. 20.

A. Scope [§ 6.279]

See generally [Wis. Stat.](#) § 752.31(2), (3).

Cases decided by one court of appeals judge rather than normal three-judge panel are

1. Children's Code cases, [Wis. Stat.](#) ch. 48;
2. Juvenile Justice Code cases, [Wis. Stat.](#) ch. 938;
3. Mental Health Act cases, [Wis. Stat.](#) ch. 51;
4. Protective placement and services cases, [Wis. Stat.](#) ch. 55;
5. Small claims cases, [Wis. Stat.](#) ch. 799;
6. Misdemeanors;
7. Traffic-regulation violation cases;
8. Municipal-ordinance violation cases;
9. Civil forfeitures; and
10. Contempt-of-court cases, [Wis. Stat.](#) ch. 785.

B. Commenced Under Civil or Criminal/[Wis. Stat.](#) § 809.30 Appeal Procedures [§ 6.280]

1. Civil appeal procedures, *see supra* §§ [6.11–14](#), apply under [Wis. Stat.](#) § 809.40(2) to the following:
 - a. Small claims cases, *see* [Wis. Stat.](#) ch. 799;
 - b. Traffic-regulation violation cases; and
 - c. Municipal-ordinance violation cases.
2. Criminal/[Wis. Stat.](#) § 809.30 appeals procedures, *see supra* §§ [6.28–38](#), apply to the following:
 - a. Children's Code cases, *see* [Wis. Stat.](#) ch. 48, except appeals under [Wis. Stat.](#) §§ 48.375(7) (waiver of parental consent for abortion) and 48.43 (termination of parental rights);
 - b. Juvenile Justice Code cases, *see* [Wis. Stat.](#) ch. 938;
 - c. Mental Health Act cases, *see* [Wis. Stat.](#) ch. 51;
 - d. Protective placement and protective services cases, [Wis. Stat.](#) ch. 55;
 - e. Commitments of defendants found not guilty by reason of mental disease or defect, [Wis. Stat.](#) § 971.17;

- f. Sexually violent person commitments, *see* [Wis. Stat.](#) ch. 980; and
- g. Misdemeanors.

C. Uniform Procedure [§ 6.281]

All procedural rules for three-judge appeals apply to one-judge appeals, except opinions by a single judge are not published. [Wis. Stat.](#) § 809.23(1)(b)4.

VIII. PETITION FOR REVIEW BY SUPREME COURT [§ 6.282]

A. Determine Whether Court of Appeals' Decision May Be Reviewed [§ 6.283]

1. Adverse final decision of court of appeals. [Wis. Stat.](#) §§ 808.10, 809.62(1m); [Heffernan](#), *supra* § 6.3, § 23.2.
 - a. Decision must finally dispose of matter in court of appeals. *Henderson v. Rock Cnty. Dep't of Soc. Servs. (In the Int. of A.R.)*, 85 Wis. 2d 444, 446 (1978).
 - b. Decision—mandate or result—must be adverse to petitioner; no review of adverse opinion (rationale) with favorable decision. [Wis. Stat.](#) § 809.62(1g); *Neely v. State*, 89 Wis. 2d 755, 758 (1979).
2. Court of appeals decision to grant or deny leave to appeal is not reviewable. *Aparacor, Inc. v. DILHR*, 97 Wis. 2d 399, 403–04 (1980); [Heffernan](#), *supra* § 6.3, § 23.2.

B. Determine Whether Supreme Court Likely to Accept Review [§ 6.284]

1. Supreme court is not primarily an error-correction court. *State v. Mosley*, 102 Wis. 2d 636, 665–66 (1981); [Heffernan](#), *supra* § 6.3, § 23.9.
2. Supreme court favors review of cases involving law development or policy issues as reflected in following criteria, *see* [Heffernan](#), *supra* § 6.3, § 23.9:
 - a. Real and significant question of federal or state constitutional law presented. [Wis. Stat.](#) § 809.62(1r)(a).
 - b. Petition for review demonstrates need for supreme court to consider establishing, implementing, or changing policy within its authority. [Wis. Stat.](#) § 809.62(1r)(b).
 - c. Decision by supreme court will help develop, clarify, or harmonize law and
 - (1) Case calls for application of new doctrine rather than mere application of well-settled principles to factual situation,
 - (2) Question presented is novel, and its resolution will have statewide impact, or
 - (3) Question presented not factual in nature but a question of law likely to recur unless resolved by supreme court. [Wis. Stat.](#) § 809.62(1r)(c).

- d. Wisconsin Court of Appeals' decision conflicts with controlling opinions of U.S. Supreme Court, Wisconsin Supreme Court, or other Wisconsin Court of Appeals' decisions. [Wis. Stat.](#) § 809.62(1r)(d).
- e. Wisconsin Court of Appeals' decision is in accord with opinions of Wisconsin Supreme Court or Wisconsin Court of Appeals, but because of passage of time or changing circumstances, opinions are ripe for reexamination. [Wis. Stat.](#) § 809.62(1r)(e).

C. Draft Petition for Review [§ 6.285]

NOTE: E-filing is not yet in effect in the Wisconsin Supreme Court except for certain cases selected for test purposes. Paper filing, signatures, and multiple copies are still required in most cases. *See generally* [Heffernan](#), *supra* § 6.3, ch. 23. *See also* Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021)

1. Form. *See generally* [Heffernan](#), *supra* § 6.3, §§ 23.5–6.
 - a. Length: No more than 35 pages if using a monospaced font or handwriting or 8,000 words if using proportional serif font. [Wis. Stat.](#) § 809.62(4).
 - b. Must conform to brief specifications of [Wis. Stat.](#) § 809.19(8)(b), (bm), and (8g) and have a white cover page. [Wis. Stat.](#) § 809.62(4).
2. Contents. *See generally* [Heffernan](#), *supra* § 6.3, §§ 23.7–12. Under [Wis. Stat.](#) § 809.62(2), petition must contain the following:
 - a. Table of contents;
 - b. Statement of issues;

CAUTION: An attorney drafting a petition for review should ensure that the statement of issues is complete. If the petition is granted, briefing will be limited to those issues identified in the petition. [Wis. Stat.](#) § 809.62(6).

- c. Statement of criteria for review (see criteria listed at section [6.45](#), *supra*);
- d. Statement of the case (facts), procedural posture, prior dispositions in circuit court and court of appeals;
- e. Argument (melds merits of case with criteria for review); and
- f. Appendix. Must be submitted as separate document from the petition. Most important parts are decisions of circuit and intermediate appellate courts.

D. File Petition for Review [§ 6.286]

1. File 10 copies with the clerk of supreme court within 30 days after date of court of appeals' decision. [Wis. Stat.](#) §§ 808.10, 809.62(4) (2019–20); [Heffernan](#), *supra* § 6.3, § 23.3.

- a. Thirty-day period cannot be extended but is tolled by the timely filing of a motion for reconsideration in the court of appeals. [Wis. Stat.](#) § 809.62(1m)(b).
 - b. Filing petition stays further proceedings in court of appeals except reconsideration. [Wis. Stat.](#) § 809.62(5).
2. Serve one copy on each party. [Wis. Stat.](#) § 809.80(2); [Heffernan](#), *supra* § 6.3, § 23.3.

E. File Response [§ 6.287]

1. File within 14 days after service of petition. [Wis. Stat.](#) § 809.62(3); [Heffernan](#), *supra* § 6.3, § 23.13.
2. Form. [Heffernan](#), *supra* § 6.3, § 23.13.
 - a. Must comply with [Wis. Stat.](#) § 809.19(8)(b) and (bm), and not exceed 35 pages if using monospaced font or handwriting or 8,000 words if using proportional serif font, [Wis. Stat.](#) § 809.19(8)(c); also must have a white cover page. [Wis. Stat.](#) § 809.62(4).
 - b. Need not follow format of [Wis. Stat.](#) § 809.62(2), although that is the desirable model
 - c. File 10 copies. [Wis. Stat.](#) § 809.62(4) (2019–20).

IX. BYPASS [§ 6.288]

NOTE: Bypass is the procedure for removing a case from the court of appeals to the supreme court.

A. Determine Suitability for Bypass [§ 6.289]

1. No statutory or case law criteria. [Heffernan](#), *supra* § 6.3, § 24.2.
2. Supreme court practice is to measure bypass petition against criteria used to analyze petitions for review under [Wis. Stat.](#) § 809.62(1r), *see supra* § 6.45.

B. Draft Petition for Bypass [§ 6.290]

NOTE: E-filing is not yet in effect in the supreme court except for certain cases selected for test purposes. *See generally* [Heffernan](#), *supra* § 6.3, ch. 23. *See also* Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021).

1. Only statutory requirement regarding content is that petition contain statement of reasons for bypassing court of appeals. [Wis. Stat.](#) § 809.60(1)(a).
2. Clearly identify issues and present sufficient facts to enable court to understand issues.

C. File Petition for Bypass [§ 6.291]

1. Filing of petition stays court of appeals from deciding case.

2. File nine copies with clerk of supreme court *after* filing of respondent’s court of appeals brief, *but no later* than 14 days after filing of that brief. [Wis. Stat.](#) § 809.60(1)(a); *see also* [Wis. Stat.](#) 809.81(2) (2019–20).
3. Serve petition on all parties. [Wis. Stat.](#) § 809.80(2) (2019–20).

D. File Response [§ 6.292]

File within 14 days after service after petition for bypass. [Wis. Stat.](#) § 809.60(2).

Chapter 7

Buying and Selling a Business

Timothy G. Schally

Michael Best & Friedrich LLP

Milwaukee

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 257; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2022, No. 796; all references to the United States Code (U.S.C.) and Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-129 (May 21, 2022); and all references to Treasury regulations (Treas. Reg.) are current through 87 Fed. Reg. 31,742 (May 25, 2022).

NOTE: At the time of publication, the federal and state governments have taken steps, including enacting legislation, to assist businesses and individuals affected by the COVID-19 pandemic. For more information, readers are encouraged to visit the following websites: Wis. Econ. Dev. Corp., *COVID-19 Business Resources*, <https://wedc.org/programs-and-resources/covid-19-response/> (last visited May 18, 2022); Wis. Econ. Dev. Corp., *Focus Forward*, <https://wedc.org/focus-forward/> (last visited May 18, 2022).

NOTE: Governor Tony Evers signed 2021 Wis. S.B. 566 into law as 2021 Wis. Act 258 on April 15, 2022. Changes made by Act 258 have not been incorporated into this chapter. Among other changes, Act 258 significantly modified the state’s uniform partnership law, [Wis. Stat.](#) ch. 178, and repealed and recreated the state’s limited liability company (LLC) law, [Wis. Stat.](#) ch. 183. For more information on how Act 258 will affect filings, see the Wisconsin Department of Financial Institutions’ website, <https://www.wdfi.org/>. For an overview of Act 258, see Adam J. Tutaj, *Wisconsin’s New Business Entity Law Takes Effect Jan. 1*, State Bar of Wis. InsideTrack (Apr. 21, 2022), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=14&Issue=8&ArticleID=29056>.

I. INTRODUCTION [§ 7.293]

A. In General [§ 7.294]

This chapter provides a brief overview of major legal and tax considerations in buying or selling a Wisconsin business.

B. Limitations [§ 7.295]

1. Purchase or sale of even a small business often involves many other areas of law, not addressed in this chapter, including real estate, commercial transactions, labor law, intellectual property, and pension and profit-sharing plans.
2. Prudent lawyers will analyze every transaction to determine the necessity and desirability of retaining the assistance of specialists.

II. PRELIMINARY NONTAX CONSIDERATIONS [§ 7.296]

A. Finding a Buyer or Seller [§ 7.297]

Sources for an attorney helping a client to find a purchaser or a business to purchase include

1. Business brokers
 - a. Names of reputable brokers are available from experienced lawyers, accountants, and bankers.
 - b. If using broker, write a contract specifying
 - (1) Duration and exclusivity of the arrangement; fail period
 - (2) Fee to be paid if broker is successful (distinguish fee based on equity value from fee based on enterprise value)
 - (3) Conditions under which fee is to be paid
2. Investment bankers, trade associations, business journals and newspapers, accounting firms, and law firms

NOTE: If using one of these sources, clarify whether the client is willing to pay the source for the efforts made on the client's behalf.

B. Establishing Price [§ 7.298]

1. Ongoing business often valued by reference to
 - a. Fair market value of assets
 - b. Representative earnings: After-tax earnings are often averaged for a period (e.g., five years) after adjusting for unusual items such as excessively high or low compensation paid to owners; average multiplied by "fair" multiplier (3–6 for many small businesses; appropriate multiplier is often available from trade associations and publications and often goes up or down based on the state of the economy or other factors).

2. Textbooks detail the valuation process, but an inexperienced lawyer should not undertake this task alone.
 - a. Seek help of an expert appraiser
 - (1) Appraiser of assets, or
 - (2) Entity appraiser (evaluates business as ongoing entity).
 - (a) Many accounting firms and investment bankers provide an entity appraisal for a fee.
 - (b) Some large corporations specialize in entity appraisal.
 - b. Consult trade associations or journals if the particular industry has well-developed valuation rules of thumb.
3. Attorney may help parties agree on price (e.g., if parties disagree on probable future earnings of business, attorney can structure purchase price contingent on future events).

C. Buyer's Review [§ 7.299]

1. Buyer should review business operations and assets to determine whether to proceed.
2. Usually desirable at initial buyer-seller contact to obtain financial data and information sufficient to determine whether further expenditure of buyer's time and money is warranted.
 - a. Extent of data varies with the size and nature of business.
 - b. Data may include
 - (1) Fully audited financial statements (verified by certified public accountant (CPA))
 - (2) Less formal statements prepared by outside accountant (not verified by CPA)
 - (3) In-house statements prepared by seller
 - (4) Income tax returns
 - (5) Sales and use tax returns
 - (6) Any other information critical to buyer's decision to proceed (such as existing environmental reports; litigation summaries)
3. Generally, it is in seller's best interest to require a written agreement on confidentiality and return of information in the event that transaction is not consummated.
4. If buyer decides to proceed after preliminary investigation,

- a. Generally, it is desirable to investigate in more detail before entering into a definitive contract.
 - b. Contract may be entered into before a detailed investigation, but attorney should structure the contract so buyer can walk away from the transaction if the investigation discloses serious problems.
5. Many business-acquisitions textbooks contain checklists for help in this process. *See, e.g., Stanley Foster Reed et al., The Art of M&A* (4th ed. 2007); *PPC's Guide to Buying or Selling a Business* (Thomson Reuters 24th ed. 2018).

D. Obtaining Consents [§ 7.300]

1. Many proposed business transfers unravel because owner needs but cannot obtain the consent of other parties.
 - a. May need consent of mortgagees and other lenders, landlords, minority owners, etc.
 - b. Determine early whether consents are necessary and obtain them.
 - c. May be able to change the structure of proposed purchase to avoid necessity of consents (e.g., from an asset purchase to a *statutory merger*).
2. Other important consents may include
 - a. Key employees' agreement to remain on the job after the sale, or
 - b. Agreement by important customers or suppliers to maintain relationship after sale.
3. Buyer and seller should together consider the best ways to obtain consents.

E. Letters of Intent [§ 7.301]

1. Sometimes desirable to use a letter of intent between buyer and seller before definitive agreement (e.g., if definitive agreement is to be delayed).
2. Letter of intent outlining main terms of transaction can prevent misunderstandings.
3. If one or both parties want a legally binding preliminary document, a letter of intent may be so used.
 - a. For example, seller may want the parties to be bound to negotiate in good faith because seller is turning away other prospective buyers, and buyer may want seller to be bound to conduct business in a manner consistent with the seller's past practices.
 - b. In many smaller transactions, however, the inherent ambiguity of a binding letter of intent may make it preferable to avoid such a letter (alternative may be to accelerate the drafting and signing of definitive agreements).

4. If a letter of intent is used, both parties should agree on the extent (if any) to which it is binding and expressly incorporate such agreement into the letter.

F. Deciding on Structure [§ 7.302]

1. If business sold is a proprietorship, consider the following:
 - a. Whether sale is for cash or deferred payment; this depends on
 - (1) Financial considerations
 - (2) Tax consequences
 - b. From the viewpoint of buyer, whether to purchase in buyer's name or as partnership, corporation, limited liability company (LLC), or limited liability partnership (LLP)
 - (1) Consider tax and nontax factors (such as limited liability).
 - (2) Consult appropriate text (*see, e.g.*, Timothy G. Schally, *Organizing a Business*, [ch. 8](#), *infra*) if inexperienced.
 - c. If buyer is already in business, whether new business is to be acquired by existing entity or by newly formed entity (depends on usual tax and nontax factors, including desirability of insulating assets of existing business from risks and contingencies of newly acquired venture).
2. If business being sold is a partnership or an LLP, consider the following:
 - a. Factors listed at para. 1., *supra*
 - b. Whether it is preferable to buy the assets of partnership or the seller's partnership interest
 - (1) If the entire business is acquired, there are usually no tax or nontax differences between these approaches (unless in the unusual situation in which the assets are subject to restrictions on transfer that will not apply if partnership interests sold instead).
 - (2) If less than the entire business is acquired, and in special situations, there may be tax and nontax differences in these approaches. *See infra* §§ [7.22](#), [7.23](#).
3. If business being sold is corporation, consider the following:
 - a. Factors listed at para. 1., *supra*
 - b. Whether transaction should be taxable sale or tax-deferred reorganization

NOTE: *Reorganization rules* uniformly require that all or part (depending on the structure of the transaction) of the seller's consideration be the buyer's stock, and because the small-business seller often wants cash or a note, this alternative is often unavailable. I.R.C. § 368.

- c. Whether transaction should be sale of stock or sale of assets. The usual considerations include
 - (1) Parties' decisions regarding handling of liabilities of selling corporation
 - (a) In a stock sale, known and unknown liabilities go with assets to buyer (usually advantageous for seller, disadvantageous for buyer).
 - (b) In an asset sale, buyer can usually decide which liabilities to assume and which to leave with seller (usually advantageous for buyer, less so for seller).
 - (2) Existence or lack of nontransferable assets—if seller owns assets subject to restrictions on sale (e.g., imposed by lender), restrictions can sometimes be avoided by selling corporate stock rather than assets.
 - (3) Tax issues discussed in sections [7.24–.28](#), *infra*
4. If business sold is an LLC, consider the following:
 - a. Factors listed at para. 1., *supra*
 - b. Whether it is preferable to buy assets of LLC or seller's LLC interest
 - (1) If the entire business is acquired, usually no tax or nontax differences arise (unless the assets are subject to restrictions on transfer that will not apply if LLC interests are sold).
 - (2) If less than the entire business is acquired, and in certain special situations, there may be tax and nontax differences in these approaches, *see infra* § [7.29](#).

III. NEGOTIATING AND DRAFTING CONTRACT [§ 7.303]

A. In General [§ 7.304]

1. Attorney representing buyer usually prepares first draft of purchase agreement.
2. May use preprinted form, such as WB-16, Business Offer to Purchase (sometimes appropriate for acquisition of the assets of a very small business, but *never* for acquisition of stock).
3. Because transfer of operating business is almost always more complicated than a simple real estate transfer, most experienced lawyers prefer to draft their own contracts.
4. If drafting own contract, use checklist from a business-acquisitions textbook (more complete than basic list given below), *see supra* § [7.7](#).
5. Basic items covered in small-business-acquisition agreements include the following:
 - a. Names of purchaser and seller (note whether individuals, partnerships, LLPs, LLCs, or corporations)

- b. What is being transferred
 - (1) Describe any stock, partnership, LLP interests, or LLC interests being sold.
 - (2) If assets are being sold,
 - (a) List each tangible asset individually (minor items may be listed generically).
 - (b) List any intangible assets, such as trade name, goodwill, customer lists, contracts, and items for which an amount has been paid but the property or service has not yet been delivered (prepaids).
 - (c) State explicitly whether any tangible or intangible asset that might seem part of business is excluded, such as the business name or life insurance on principals.
- c. Purchase price
 - (1) If to be paid in full at closing, specify whether by certified check, cashier's check, or wire transfer.
 - (2) If wholly or partly deferred, set forth terms (payment dates, interest, subordination, security, etc.); it is good practice to attach a draft of the note to be delivered (as exhibit to purchase agreement).
 - (3) May be advantageous for tax purposes to allocate total purchase price among separate assets.
- d. Method of handling liabilities detailed in section [7.13](#), *infra*
- e. Representations and warranties
 - (1) Seller must almost always make some representations as to the status of business and its assets; full discussion of these provisions is beyond the scope of this chapter, but examples include representations of
 - (a) Seller's ownership of assets being sold (statement that there are no liens or encumbrances except as specified)
 - (b) Condition of assets
 - (c) Accuracy of any financial statements seller has delivered to buyer
 - (d) Presence or absence of actual or potential litigation or other adverse business developments
 - (e) Existence of any significant contracts or other obligations
 - (f) Lack of any contract breaches

(g) Absence of violations of law

- (2) Contract should provide for the update of representations to the date of contract, especially if representations are tied to the financial statement.

NOTE: A representation tied to an earlier date (e.g., before the year's end) is not violated by any interim adverse development.

- (3) If agreement provides for a later closing date, include mechanism to ensure representations will be true on closing date.
- (a) May provide that any preclosing developments that would breach warranty must be disclosed and that other party may then waive warranty or terminate transaction.
 - (b) Common to have seller deliver a certificate at closing stating that all representations are still accurate.
- (4) Seller's counsel should note that, unless representation is qualified by "knowledge" or "materiality" standard, it can serve as a guaranty that, if violated, could result in postclosing liability for seller; for example:
- (a) Seller represents that products do not violate any patents held by others; promise is probably breached by later successful infringement claim, even if seller had no knowledge of problem at closing; or
 - (b) Seller represents that balance sheet is accurate; could be guaranteeing collectibility of all accounts receivable on sheet.
- (5) Common for seller to include limitation that "representations made to best of seller's knowledge"; buyer's attorney usually resists this limitation; issue is which party bears the economic risk of the unknown.
- (6) All clients should understand the meaning and effect of all provisions in representations.

f. Indemnification provisions

- (1) If seller has made representations and warranties, common to provide in agreement the manner in which buyer can obtain indemnification for any breaches.
- (2) May include
- (a) Time period (after closing) within which any claim must be brought
 - (b) De minimis (*basket*) provisions
 - (c) Cap on seller's maximum liability
 - (d) Indemnification for attorney fees

- (e) Notice and other procedure provisions and method of resolving conflicts (e.g., arbitration)
- (f) Requirement that part of the purchase price be placed in escrow for some period
- (g) Statement that indemnification is the exclusive remedy when asserting claim for damages

NOTE: Various surveys summarize the types and frequency of these provisions; *see, e.g.*, Am. Bar Ass'n (ABA), Business Law Section, *2019 Private Target M&A Deal Points Study* (available to ABA Business Law Section and Mergers and Acquisitions Committee members for free at https://www.americanbar.org/groups/business_law/committees/ma/deal_points/).

- (3) In lieu of or in combination with indemnification, parties might consider representation and warranty insurance, which is available from some insurance companies.
- g. Covenants and conditions to closing
- (1) If closing is held after signing of the agreement, agreement often imposes various covenants (promises to be performed) on parties in interim (e.g., seller responsible for carrying on business in manner that protects buyer's rights).
 - (2) Agreement usually lists conditions to closing, i.e., events that must or must not occur for parties to remain obligated to close.
 - (3) Agreement often requires attorneys to deliver appropriate legal opinions at closing.

B. Handling of Liabilities [§ 7.305]

- 1. One of the most important aspects of transfer of business is the handling of seller's liabilities.
- 2. Transfers of corporate stock and interests in LLC or LLP
 - a. All liabilities of corporation, LLC, or LLP stay with entity and become at least the indirect responsibility of purchaser.
 - b. Parties should ensure that sale of stock, or LLC or LLP interests, does not accelerate any corporate, LLC, or LLP liabilities (possible, e.g., under terms of some loan agreements).
 - c. The selling shareholder or LLC or LLP member often has outstanding personal guaranties related to corporate, LLC, or LLP debts and other obligations.
 - (1) Seller usually wants to obtain release from such guaranties.
 - (2) If release cannot be obtained, seller usually wants to ensure that corporation, LLC, or LLP pays debt or satisfies obligation so seller will not have to make good on guaranty.

3. Transfers of assets
 - a. Situation is usually more complex than with transfers of stock or LLC or LLP interests, although acceleration and guaranties issues may be relevant, *see supra* para. 2.
 - b. Buyer of assets may choose among liabilities and other obligations (including contracts) to assume.
 - (1) List carefully in acquisition agreement, along with statement that liabilities not so listed are not assumed (does not avert all problems, however).
 - (2) Growing body of case law in which buyer of ongoing business is held liable for products-liability or environmental claims for products manufactured before transfer. *Fish v. Amsted Indus.*, 126 Wis. 2d 293 (1985).
 - (3) Liabilities can arise out of statutory or case law in connection with seller's sales tax, employment taxes, and other matters beyond the scope of this chapter (e.g., withholding purchase price pending tax clearance certificates). I.R.C. § 6672; [Wis. Stat.](#) §§ 77.52(18), 77.60(9).
 - c. For seller of assets, buyer's agreement to assume liabilities and obligations of business does not release seller.
 - (1) If possible, obtain releases from lenders and other third parties.
 - (2) If releases cannot be obtained, insist on protection from buyer that assumed liabilities will be paid.
4. Under the federal Worker Adjustment and Retraining Notification Act (WARN), certain employers (generally, those having 100 or more employees) must give 60-day notice to employees (or their union representatives), designated state dislocated-worker unit, and chief elected official of local government unit before plant closing or mass layoff. 29 [U.S.C.](#) § 2101.
 - a. Seller is responsible for providing required notice of closing or layoff occurring before effective time of sale. In asset sale, seller should terminate employment of employees before effective time of sale; thus, seller is responsible for notice. *But see infra* para. d.
 - b. Buyer responsible for providing required notice of closing or layoff occurring after effective time of sale. This situation is especially applicable to a sale of stock; buyer responsible for notice if employees are to be terminated after sale.
 - c. Agreement should address when and by whom employees are to be terminated.
 - d. Wisconsin plant closing law (similar to WARN) may also apply; threshold of affected employees lower than WARN, and required notice need not be given if buyer agrees in written purchase agreement to rehire "substantially all" the seller's employees; employees have private cause of action for lost wages. [Wis. Stat.](#) §§ 109.07, 893.97; [Wis. Admin. Code](#) ch. DWD 279.

NOTE: Full discussion of these laws is beyond the scope of this chapter.

C. Other Documents; Corporate and LLC Formalities [§ 7.306]

1. Besides acquisition agreement, business transfer may require promissory notes, employment contracts, covenants not to compete, escrow and indemnification agreements, and transfer agreements, *see infra* § [7.17](#).
2. If corporate stock or interests in LLC are being sold, buyer's attorney should
 - a. Review stock record book or LLC records to determine the identity of shareholders or members.
 - b. Determine whether any shares or LLC interests are subject to *buy-sell rules* by contract, under articles of incorporation or bylaws, or under LLC operating agreement; if so, obtain waivers or cancellations.
 - c. In LLC, if no special provisions, buyer obtains only the financial rights of seller, not any voting or management rights. [Wis. Stat.](#) § 183.0704 (2019–20).
 - d. If certificates are missing, obtain appropriate indemnification agreements or bonds.
 - e. Look for options, convertible securities, or other promises of equity issuance.
3. If corporate or LLC assets are being sold, obtain votes by directors and shareholders of selling corporation (or managers or members of selling LLC) through meeting or unanimous written consent.
 - a. For corporation, requisite vote is the majority of all votes entitled to be cast or greater if required by articles of incorporation or bylaws. [Wis. Stat.](#) § 180.1202.
 - b. For corporation, notice requirements to shareholders must be followed.
 - c. For LLC, must first determine (by examining LLC's articles of organization) whether LLC is managed by its members or by managers.
 - (1) If LLC is managed by its members, it appears that any member may transfer title to its assets by an instrument of transfer, regardless of whether any limitations on that member's authority are contained in operating agreement; probably good practice nonetheless for buyer to examine operating agreement, if any. [Wis. Stat.](#) § 183.0702(1) (2019–20).
 - (2) If LLC is managed by managers, it appears that any manager (but no member who is not a manager) may transfer title to its assets by an instrument of transfer, regardless of whether any limitations on that manager's authority are contained in operating agreement; probably good practice nonetheless for buyer to examine operating agreement, if any. [Wis. Stat.](#) § 183.0702(2) (2019–20).
4. If selling corporation (or LLC) is to be dissolved, shareholders and directors (or LLC members and managers) should also adopt appropriate resolutions of dissolution and articles of dissolution should be prepared; publishing notice of dissolution may effectively cut off claims

of unknown claimants after a specified period. [Wis. Stat.](#) §§ 180.1401–.1440, 183.0901–.0909 (2019–20); *New Horizons Supply Coop. v. Haack*, No. 98-1865, 1999 WL 33499 (Wis. Ct. App. Jan. 28, 1999) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

5. If business being sold is partnership or LLP, examine partnership agreement.
6. Buyer or buyer's attorney should also review other formalities required for buyer to operate business (state and local licenses, occupancy permits, tax registrations, insurance assignments, worker's compensation and unemployment insurance matters, etc.).

IV. CLOSING AND POSTCLOSING [§ 7.307]

A. In General [§ 7.308]

Business can be transferred with

1. Simultaneous closing (closing takes place when purchase agreement is signed), or
2. Deferred closing (more common; closing takes place sometime after signing of acquisition agreement).

B. Transfer Documents [§ 7.309]

1. With simultaneous or deferred closing, seller should deliver to buyer at closing all documents necessary to transfer ownership of the assets to be sold, including
 - a. Real estate deeds, when appropriate, and I.R.C. § 1445 affidavit
 - b. One or more bills of sale describing all tangible and intangible personal property to be transferred
 - c. Appropriate assignment forms for transfers of leases, etc.
 - d. If stock or interests in LLC are being sold, certificates should be endorsed or accompanied by transfer forms.
 - e. If corporate or LLC stock is transferred, resignations may be required from officers, directors, or LLC managers (should be delivered).
2. Buyer should acknowledge receipt of all documents and deliver check or note or order wire transfer.

C. Other Procedures [§ 7.310]

1. Parties should agree on press release, if desired.
2. Parties should agree on the method of notifying employees if this is not already done.

V. TAX CONSIDERATIONS [§ 7.311]

NOTE: In certain situations, federal tax changes first effective in 2018 may affect the buying and selling of a business. For further discussion, see Carl Fortner, Tim Schally, Jim Phillips, John Barry & Jim Blinka, Remarks at the Milwaukee Tax Club: Selected Highlights and Commentary on the Potential Impact of the Tax Cut and Jobs Act on Domestic Mergers and Acquisitions (May 14, 2018) (outline available from author).

A. Sale of Proprietorship—Seller’s Perspective [§ 7.312]

1. Income tax consequences of sale are calculated on an individual asset-by-asset basis.
 - a. Seller must first determine adjusted tax basis of each asset on the date of sale (most commonly equals initial purchase price minus tax depreciation since acquisition).
 - b. Seller must determine selling price for each asset.
 - (1) Total sales price for business must be allocated among assets being sold; method of allocation is described in section [7.21](#), *infra*.
 - (2) Total sales price includes money and property received by seller, deferred payment obligations of buyer, and liabilities assumed by buyer or attached to property acquired by buyer.
2. After the adjusted basis and sales price of each asset are determined, difference for each asset is taxable as ordinary income or loss unless asset is capital asset or section 1231 (I.R.C. § 1231) asset in the hands of seller; gain or loss on sale of capital assets or section 1231 assets may be capital gain or loss.
 - a. Most business assets are either capital assets or section 1231 assets; significant exceptions are inventory and other property held by seller for sale to customers in the ordinary course of business.
 - b. Seller’s overall tax consequences are determined by adding together all ordinary and capital gains or losses for all assets sold.
 - c. Income from noncompetition agreements will be taxed at ordinary income rates.
3. Discussion of how taxation of capital gains and losses differs from taxation of ordinary income and losses may be summarized as follows:
 - a. If sale is at a gain, capital gains might be taxed at lower federal tax rate; another advantage of capital gain for federal tax purposes is the ability to offset capital losses.
 - b. For individual taxpayers, Wisconsin allows a 30% deduction for long-term capital gains. [Wis. Stat. § 71.05\(6\)\(b\)9](#).
 - c. In addition to the federal and state income tax rates applicable to ordinary income and capital gain, a 3.8% “Medicare tax” also may apply to certain “investment” income, as defined. The 3.8% Medicare tax applies to net investment income of individuals, as well as certain trusts and estates. Investment income includes interest, dividends, annuities,

royalties, and rents and may include income from flow-through entities (such as partnerships and S corporations) and gain on the sale of stock and business assets, under certain circumstances. With respect to individuals, the thresholds for application of the tax are “modified adjusted gross incomes” as follows:

Married filing a joint federal income tax return: \$250,000

Married filing separately: \$125,000

Everyone else: \$200,000

See I.R.C. § 1411 and the regulations promulgated thereunder.

- d. If sale is at a loss, it will be better to have ordinary loss because capital losses cannot be deducted against seller’s ordinary income (from other sources) except to a limited extent.
 - e. If sale is at a loss to a related party (as defined under I.R.C. § 267), seller might not be able to recognize loss. I.R.C. § 267.
4. Even if gain would otherwise be taxed as capital gain, all or part might be subject to the following:
 - a. Depreciation recapture rules of I.R.C. § 1250 (applicable generally only to real estate depreciated in a manner faster than straight-line depreciation). I.R.C. § 1250.
 - b. Depreciation recapture rules of I.R.C. § 1245 (applicable generally to all personal property subject to depreciation). I.R.C. § 1245.
 - c. Special I.R.C. § 1239 rule, which provides that on sales of property between certain related persons, any gain recognized by transferor is treated as ordinary if property is depreciable in hands of transferee. I.R.C. § 1239.
 5. If property for which seller has claimed investment tax credit is sold, sale might result in investment tax credit recapture. I.R.C. § 50.
 6. Some transferred assets may be non-capital-gain property (e.g., inventory), and some capital-gain assets might be subject to recapture while others are not; might be important to seller to allocate price in manner that will minimize seller’s tax liability.
 7. If sale payments are made in installments, I.R.C. § 453 generally allows gain to be reported as installments are received.
 - a. Installment sale treatment is not available for depreciation recapture, items sold at loss, inventory-type property (except for certain dealers in such property), sales to certain related parties, and sales of publicly traded stocks and securities. I.R.C. § 453.
 - b. Complications arise in application of the installment sales rules when part or all of the purchase price is contingent on future events, such as post-sale performance of the acquired business. Jeffrey L. Kwall & Timothy G. Schally, *Tax Consequences of Contingent Payment Transactions*, 566 Tax Mgmt. (BNA).

- c. Sale of any assets for more than \$150,000 gain on installment basis may be subject to interest charge (only if face amount of all obligations arising during and outstanding at end of year exceeds \$5 million) and to installment pledge rules. I.R.C. § 453A.
- 8. If a deferred-payment sale, part of purchase price may be interest for tax purposes (taxable to seller as ordinary income).
 - a. Applies only if agreement does not provide for certain minimum interest. I.R.C. § 483; I.R.C. § 1274.
 - b. Minimum interest that must be charged (the *Applicable Federal Rate*) fluctuates monthly, although for many small transactions it will never exceed nine percent.
 - 9. Wisconsin income tax rules are generally the same as federal rules.
 - 10. If seller holds, or must hold, a Wisconsin sales tax seller's permit and sells its business, seller will be subject to sales tax on its bulk sale of otherwise taxable assets, unless seller ceases active conduct of its business at that location before the sale; exception does not apply to any motor vehicles included in the sale, which would be subject to sales tax in any event. Inventory generally can be sold on a sales-tax-free basis (and buyer should provide a "resale" certificate to this effect). Certain other exemptions may apply, depending on the circumstances (e.g., for "machinery and equipment" under [Wis. Stat. § 77.54\(6\)](#)). [Wis. Stat. § 77.51\(9\)\(am\)](#).
 - 11. Real estate transfer fee may apply, subject to possible exemptions, to the transfer of real property; amount is \$3 per \$1,000 of value. [Wis. Stat. § 77.25](#) (2019–20).

B. Sale of Proprietorship—Buyer's Perspective [§ 7.313]

- 1. Just as seller of proprietorship is treated as having sold each individual asset, buyer of proprietorship is treated as having purchased each asset.
 - a. Buyer will not obtain benefit of any of seller's tax attributes (e.g., any net operating loss carryovers).
 - b. Buyer obtains new basis for each asset, equaling buyer's purchase price, and starts new holding period.
- 2. Allocation of purchase price is very important to buyer.
 - a. For "qualified property" (generally, certain tangible personal property, as defined) placed in service after September 27, 2017, and before January 1, 2023, the purchaser in a taxable acquisition generally can deduct immediately 100% of the purchase price of the qualified property (the percentage phases down and then out for qualified property placed in service after December 31, 2022 and before January 1, 2027). I.R.C. § 168(k).
 - b. Remainder of price can be treated in one of the following two ways:
 - (1) Remainder of price can be depreciated to the extent it is allocated to real property (other than land) or to tangible personal property (in general, latter more advantageous because depreciation life is shorter); or

- (2) Remainder can be amortized ratably over 15 years to the extent it is allocated to so-called section 197 intangibles, defined to include goodwill, covenants not to compete, going concern value, licenses, customer lists, and certain similar intangibles; however, under the I.R.C. § 197(f)(9) *anti-churning rule*, if sale is to a related person (as defined), amortization of goodwill might not be allowed. I.R.C. § 197.
 - c. To the extent payment to seller is compensation (e.g., consultation fees), buyer can deduct over period of performance.
 - d. Because buyer usually prefers to write off purchase price for tax purposes as rapidly as possible, allocation of aggregate purchase price (including any liabilities assumed or “taken subject to”) is very important to buyer.
3. Agreement between buyer and seller as to allocation of purchase price among assets is not required but is desirable. I.R.C. § 1060; Treas. Reg. § 1.338-6; Treas. Reg. § 1.338-7.
 - a. Preferable for parties to agree and set forth terms in purchase agreement.
 - b. If parties cannot agree, they should allocate purchase price in accordance with their respective understandings of fair market values of purchased assets.
 - c. Each party must report allocation to IRS on Form 8594, which requires (among other things) disclosure as to whether parties agreed to the allocation.
 4. Wisconsin rules are the same as federal rules.

C. Sale of Partnership—Seller’s Perspective [§ 7.314]

NOTE: See section [7.29](#), *infra*, for a discussion of sales of LLCs and LLPs.

1. Because different transfers may be taxed differently, it is necessary to first determine whether sale of partnership is
 - a. Sale by partnership of its assets, or
 - b. Sale by partners of their partnership interests.
2. If partnership assets sold,
 - a. Gain or loss computed in first instance exactly as if seller is proprietorship, *see supra* §§ [7.20](#), [7.21](#).
 - b. Partnership generally does not pay tax, so gain or loss realized by partnership flows through and is recognized by partners in accordance with their respective shares.
 - (1) Respective shares determined under allocation rules of I.R.C. § 704(b) and (c).
 - (2) Flow-through occurs in partners’ personal tax years in which partnership year ends.

- (3) Each item generally retains its tax character (e.g., if gain or loss is capital in nature at partnership level, it retains that character in the hands of partners when it flows through to them).
- (4) Any gains or losses recognized by partners in this manner increase or decrease their tax basis in their partnership interests, so there is no double gain or loss when partnership is dissolved.

NOTE: Federal income tax legislation enacted in 2015 but generally effective for tax years beginning after December 31, 2017, significantly changed the procedures relating to audits of certain partnerships (and entities treated as partnerships) for income tax purposes. These changes provide that certain partnerships might be liable for audit adjustments, although actions can be taken so that the partnership adjustments apply at the partner level. Accordingly, partnership agreements should address procedures and elections regarding income tax audits of the partnership, including effect on the partnership and partners for the current year and partners (both current and former) during the tax year(s) under audit. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101, 129 Stat. 584.

3. If transaction is a sale of partnership interest,
 - a. Seller must first determine seller's basis in interest (which, depending on a variety of factors, may not be same as that partner's allocable share of partnership's basis in its assets).
 - b. Difference between this basis and selling price of the interest generally will be a capital gain or loss regardless of the nature of the partnership assets (subject to exception noted immediately below). This treatment generally applies regardless of whether some or all of the partnership interests are sold. *See* Rev. Rul. 99-6, 1999-1 C.B. 432.

NOTE: For these purposes, basis and sales price generally will include the seller's share of partnership liabilities.

- c. *Exception:* If, at time of sale, partnership owns either "substantially appreciated inventory" or "unrealized receivables" (as defined in I.R.C. § 751 and including depreciation recapture under I.R.C. § 1245 or I.R.C. § 1250), then, under I.R.C. § 741, sale of partnership interest must be fragmented into two parts:
 - (1) Portion attributable to seller's interest in such inventory and receivables taxed as ordinary income or loss.
 - (2) Balance taxed as capital gain or loss.

NOTE: The installment method of reporting under I.R.C. § 453 may not be available with respect to the sale of a partnership interest to the extent attributable to the seller's interest in inventory and receivables; *see, e.g., Mingo v. Commissioner*, 773 F.3d 629 (5th Cir. 2014).

- d. Exception immediately above applies *only* if the partnership interest is sold to a third party or another partner; if buyer is partnership itself, different rules, which are beyond the

scope of this chapter, apply. I.R.C. § 736; *see also* Michelle M. Jewett, *A Model of Complexity and Uncertainty: Redemptions of Partnership Interests*, 72 Tax Law. 337–80 (2019).

4. Wisconsin rules generally are the same as federal rules. However, for Wisconsin tax purposes, individuals may exclude certain long-term capital gain from the sale of a “qualified investment.” A *qualified investment* is an amount paid by an individual to acquire stock or other ownership interest in a partnership, corporation, tax-option (S) corporation, or limited liability company treated as a partnership or corporation for income tax purposes. A qualified investment is an investment in a qualified Wisconsin business if (1) the investment was in a business that was a qualified Wisconsin business for the year of the investment and for at least two of the four subsequent years; and (2) the investment was made after December 31, 2010, and held for at least five uninterrupted years. A qualified Wisconsin business is a business certified by the Wisconsin Economic Development Corporation (WEDC) or registered with the Department of Revenue (DOR) that has specified levels of activity in Wisconsin. WEDC performed the certification process through 2013. The DOR registration program began in 2014. [Wis. Stat. § 71.05\(25\)](#). For further information, see Wis. DOR, *Qualified Wisconsin Business Capital Gain Exclusion*, <https://www.revenue.wi.gov/Pages/FAQS/ise-qwibexclusion.aspx> (Feb. 1, 2022). For information concerning the registration process, see Wis. DOR, *Registration of Qualified Wisconsin Businesses*, <https://www.revenue.wi.gov/Pages/FAQS/ise-qualified.aspx> (Jan. 4, 2022).

D. Sale of Partnership – Buyer’s Perspective [§ 7.315]

1. If buyer purchases partnership assets, tax consequences are the same as for purchase of proprietorship assets, *see supra* §§ [7.20](#), [7.21](#).
2. If buyer purchases partnership interest, buyer must also consider the following:
 - a. How partnership income or loss is to be allocated between purchaser or seller in year of sale:
 - (1) Allocate each item on per diem basis, or
 - (2) Effect interim closing of books. I.R.C. § 706(d).
 - b. Although buyer obtains a basis in his or her partnership interest equal to the purchase price paid, if buyer purchases less than all the partnership interest then transaction does not change partnership’s basis in its assets.
 - (1) Unfair to purchaser who acquires his or her interest at a price that reflects appreciation in partnership assets.
 - (2) Unfairness can be alleviated by partnership making election under I.R.C. § 743 and I.R.C. § 754.
 - (a) Partnership steps up basis of its assets to reflect appreciation but only for purposes of computing future depreciation and gain or loss by new partner.

- (b) Because the election is made by partnership (not partner), purchasing partner should try to bargain for such election; if not feasible, partial solution is available under I.R.C. § 732(d), which is beyond scope of this chapter.
 - c. If buyer purchases all interests in the partnership, then buyer deemed for income tax purposes to have acquired all the partnership's assets with a basis equal to the purchase price. Rev. Rul. 99-6, 1999-1 C.B. 432.
- 3. Wisconsin rules are the same as federal rules.

E. Purchases and Sales of Corporations—Tax-Free Acquisitions [§ 7.316]

- 1. Three principal types of tax-free acquisitions: “A,” “B,” and “C” reorganizations, named after subsections of I.R.C. § 368(a)(1).
- 2. Characteristics of all three include the following:
 - a. Anywhere from 40% to 100% of consideration received by seller (by value) must (depending on structure of transaction) consist of stock of acquirer, and shareholders of seller must comply with other aspects of *continuity of interest rule*. See Treas. Reg. § 1.368-1(e).

NOTE: In almost all cases, the acquirer in an I.R.C. § 368 transaction uses its common stock, rather than preferred stock. The use of preferred stock, including *nonqualified preferred stock* (as defined under I.R.C. § 351(g) and I.R.C. § 354), creates numerous complexities that are beyond the scope of this chapter.

- b. Transaction must have a *business purpose*. See Treas. Reg. § 1.368-1(c).
 - c. Buyer must, under the *continuity of business enterprise doctrine*, continue business of target or use significant portion of target's assets in a business. See Treas. Reg. § 1.368-1(d).
 - d. Effect of not recognizing the gain at the time of sale
 - (1) Stock acquired by seller in reorganization generally receives *carryover basis* (i.e., basis equal to stock or assets transferred by seller in return for buyer's stock).
 - (2) When acquired stock is sold in a taxable transaction, deferred gain presumably taxed then (although if seller dies in interim and seller's estate receives new basis, deferred gain escapes taxation). I.R.C. § 1014.
- 3. Advantages
 - a. Tax deferral, *see infra* paras. 4.–6.
 - b. General ability of purchaser to retain acquired corporation's tax attributes, such as net operating losses (although this benefit is circumscribed by several statutory restrictions, including I.R.C. § 269 and I.R.C. § 382, *see infra* § [7.28](#)).

4. Rules for A reorganizations. I.R.C. § 368(a)(1)(A); Treas. Reg. § 1.368-2(b)(1).

Must be statutory merger between two or more corporations under corporation laws of United States, a state, or District of Columbia; mergers of corporations and *disregarded entities* may qualify under certain circumstances (e.g., a merger of a corporation into an LLC wholly owned by a corporation).

5. Rules for B reorganizations. I.R.C. § 368(a)(1)(B).

- a. Selling shareholders must transfer their stock to buying corporation in return only for buyer's voting stock.
- b. Buyer must end up with at least 80% control of acquired corporation.

6. Rules for C reorganizations. I.R.C. § 368(a)(1)(C).

- a. Corporation must sell substantially all its assets to buying corporation in return solely for latter's voting stock.
- b. Seller must distribute all consideration received, as well as its other real and personal property (assumption of seller's liabilities will not violate the *solely for voting stock rule*, but if any other types of assets are received by seller, total of assumed liabilities and such other assets cannot exceed 20% of total consideration).

7. Wisconsin rules generally are the same as federal rules.

F. Taxable Sales of Corporations and Transfers of Stock—Seller's Perspective [§ 7.317]

1. If sale of corporation is structured as a sale of corporate stock,

- a. Sale almost always taxable to seller as capital gain or loss.
 - (1) Measured by difference between seller's adjusted basis in the stock at the time of sale and sale price.
 - (2) Note that seller's adjusted basis at the time of sale may equal seller's initial investment in corporation but might have to be adjusted for interim events (e.g., if corporation has been S corporation at any time between seller's initial investment and sale).
- b. If buyer does not want to acquire all assets, unwanted properties must be removed from corporation, generally before sale.
 - (1) Stockholder of seller may buy such properties from corporation.
 - (2) If property is merely distributed to selling corporation's stockholders, this may result in taxable gain to corporation and taxable dividend to recipients (although, if distribution is sufficiently connected to sale of stock, and properly structured, value of property may be treated as gain from sale or exchange). I.R.C. § 311; *Zenz v. Quinlivan*, 213 F.2d 914 (6th Cir. 1954); see Rev. Rul. 75-447, 1975-2 C.B. 113.

NOTE: For “qualified dividends” paid by *C corporations* (corporations other than those that have made tax election to be taxed under subchapter S) to individuals, the maximum federal income tax rate is 20%. I.R.C. § 1(h)(11).

- (3) In certain situations, pre-sale reorganization of the selling corporation may mitigate or eliminate problems created by “unwanted” assets. *See, e.g.*, IRS Priv. Ltr. Rul. 201115016 (Apr. 15, 2011).
2. If sale is made on an installment basis, then installment sale, imputed interest, and original issue discount rules must be considered, *see supra* § [7.20](#).
3. General rule is that sale of stock generates capital gain or loss, subject to the following major exceptions:
 - a. Sale of section 1244 stock at a loss generates preferable ordinary loss (subject to certain limits).
 - b. Sale at gain of section 306 stock (generally, preferred stock previously issued by corporation in certain types of tax-free transactions) generates ordinary income.

NOTE: The maximum federal income tax rate on “qualified dividends” (as defined) is 20%. I.R.C. § 1(h)(11).

- c. Noncorporate sellers may exclude up to 100% of the gain they realize on the disposition of qualified small business stock (up to an overall, aggregate cap of \$10 million); generally applies only to stock originally issued by corporation, acquired after Sept. 27, 2010, and held by seller for more than five years, although many other restrictions apply. For qualified small business stock acquired before September 27, 2010, the section 1202 gain exclusion percentage varied based on when the stock was acquired. I.R.C. § 1202.
 - d. Sale of stock to another corporation related to issuer or to issuing corporation might be treated as a dividend, with the entire amount received taxed as a dividend. *See* I.R.C. § 302; I.R.C. § 304.
- NOTE: The maximum federal income tax rate on “qualified dividends” (as defined) is 20%. I.R.C. § 1(h)(11).
4. If stock is sold at a loss to a related party, ability to recognize loss may be limited by I.R.C. § 267.
 5. Wisconsin rules generally are the same as federal rules, except for the following:
 - a. The I.R.C. § 1202 small business stock treatment first applies to applicable stock acquired after December 31, 2013, and held for more than five years. [Wis. Stat.](#) §§ 71.01(10)(intro.), 71.05(6)(b)6.; 2013 Wis. Act 20 (amending [Wis. Stat.](#) §§ 71.01(10)(intro.) and 71.05(6)(b)6. and creating [Wis. Stat.](#) § 71.98(5)); 173 Wis. Tax Bull. 5 (Oct. 2011).
 - b. For Wisconsin tax purposes, individuals may exclude certain long-term capital gain from the sale of a “qualified investment.” A *qualified investment* is an amount paid by an

individual to acquire stock or other ownership interest in a partnership, corporation, tax-option (S) corporation, or limited liability company treated as a partnership or corporation for income tax purposes. A qualified investment is an investment in a qualified Wisconsin business when (1) the investment was in a business that was a qualified Wisconsin business for the year of the investment and for at least two of the four later years; and (2) the investment was made after December 31, 2010, and held for at least five uninterrupted years. A qualified Wisconsin business is a business certified by the Wisconsin Economic Development Corporation (WEDC) or registered with the Department of Revenue (DOR) that has specified levels of activity in Wisconsin. WEDC performed the certification process through 2013. The DOR registration program began in 2014. [Wis. Stat.](#) § 71.05(25). For further information, see Wis. DOR, *Qualified Wisconsin Business Capital Gain Exclusion*, <https://www.revenue.wi.gov/Pages/FAQS/ise-qwibexclusion.aspx> (Feb. 1, 2022). For information concerning the registration process, see Wis. DOR, *Registration of Wisconsin Qualified Businesses*, <https://www.revenue.wi.gov/Pages/FAQS/ise-qualified.aspx> (Jan. 4, 2022).

G. Taxable Sales of Corporations and Transfers of Assets—Seller’s Perspective [§ 7.318]

1. When corporation sells its assets, gain or loss on the sale is generally computed, *see supra* §§ [7.20](#), [7.22](#), in the same manner as sale of assets of partnership or proprietorship.
 - a. Adjusted basis, allocated sales price, and asset character (i.e., capital asset, I.R.C. § 1231 asset, or neither) must be determined for each asset.
 - b. Capital gain or loss or ordinary gain or loss must be separately allocated.
 - c. Preferable for seller to agree with purchaser on allocation of purchase price.
2. Special problem arises for C corporations because there may be an additional gain when selling corporation dissolves.
 - a. To avoid this *double taxation*, corporation can be kept in existence and not dissolved (at least not until its principal shareholders die, when it generally can be liquidated without gain to shareholder because of estate’s new basis under I.R.C. § 1014).

NOTE: Consider the potential effect of personal-holding-company rules and (particularly in the year of sale) the possible application of the accumulated-earnings tax penalty. I.R.C. § 531; I.R.C. § 541.

- b. Otherwise, unless an exception listed below applies, corporation will recognize gain or loss on sale as described in para. 1., *supra*; then, shareholders will also recognize gain or loss on their receipt of cash or other distributed assets, equal to the difference between their stock basis and the amount of distributed cash and fair market value of other distributed assets.
 - (1) Corporation will also recognize gain or loss if it distributes assets in kind (calculated as if assets had been sold at fair market value); shareholder-level gain computed as in para. 2.b., *supra*. I.R.C. § 336.
 - (2) If corporate sale is in installments, corporation generally will recognize balance of any deferred gain when it distributes installment obligation to its shareholders; if

certain tests are met, shareholders can then recognize their gain as buyer makes payments. I.R.C. § 453B; I.R.C. § 453(h)(1).

- (3) Certain additional restrictions may apply to corporations seeking to recognize *loss* on sale or distribution of assets under the above rules. I.R.C. § 336(d).
 - (4) Corporate gain on sale or liquidation may be shielded by loss carryovers from earlier years.
- c. Exceptions to double taxation rule:
- (1) Corporation will not recognize gain or loss if sale or distribution is tax-free to recipient under reorganization rules, such as C reorganization, *see supra* § 7.24. I.R.C. § 336(c).
 - (2) Corporation that is a subsidiary of another corporation generally will not recognize gain or loss if certain conditions are met. I.R.C. § 332; I.R.C. § 337.
3. Usually no double tax for S corporations, but there may be such (commonly referred to as a *built-in-gains (BIG) tax*) if corporation has at any prior time been a C corporation or acquired business of a C corporation in an I.R.C. § 368 reorganization. I.R.C. § 1374.

NOTE: Generally, the BIG tax applies if the S corporation sells assets at a gain that it held, on the S election effective date, within a specified period of time after its S election became effective, referred to as the “recognition” period. The federal income tax recognition period is now 5 years (previously it was generally 10 years, although Congress had at times reduced it to 7 or 5 years). The Wisconsin recognition period for the BIG tax, however, currently is 10 years; see 183 Wis. Tax Bull. 7 (Jan. 2014). With respect to the federal income tax recognition periods, see I.R.C. § 1374(d)(7).

H. Taxable Sales of Corporations and Transfers of Stock – Buyer’s Perspective [§ 7.319]

1. Sometimes, a major reason to purchase stock is to obtain benefit of tax attributes of acquired corporations (e.g., net operating loss carryovers); buyer’s attorney should consider restrictions on using these, including the following:
 - a. Always applicable if acquisition of losses is the *principal purpose* of acquisition. I.R.C. § 269.
 - b. I.R.C. § 382 sets forth mechanical rule under which availability of losses will be reduced:
 - (1) If there is an ownership change of corporation, net operating losses of corporation from prechange years can be carried forward and deducted against corporate income in postchange years, but only to a limited extent.
 - (2) Ownership change generally occurs if percentage of stock owned by any one or more 5 percent shareholders increases by more than 50 percentage points; various family and other attribution rules apply.
 - (3) In the event of an ownership change, corporate income that can be offset by prechange losses is limited annually to the value of corporation at time of change

multiplied by long-term tax exempt rate (as defined in I.R.C. § 382(f)), plus certain income and gain items recognized after ownership change but attributable to earlier period.

- (4) I.R.C. § 382 also denies losses unless acquired business is continued for at least two years.
 - (5) Similar restrictions apply to built-in losses (including for this purpose certain “built-in deductions”), that is, assets owned by acquired corporation with fair market value at the time of acquisition less than their basis.
- c. Wisconsin business loss carryover rules should be separately considered because differences exist between state and federal rules.
2. Tax basis of assets of acquired corporation is another major tax consideration for purchaser of corporate stock.
- a. If basis is more than the fair market value, it is usually desirable to leave basis as is.
 - b. If purchase price for stock exceeds book value of underlying assets, purchaser usually wants to step up that basis to reflect purchase price. I.R.C. § 338.
 - (1) Key to this procedure is I.R.C. § 338.

NOTE: Regulations adopted under I.R.C. § 336(e) provide a similar procedure to that provided by I.R.C. § 338; the I.R.C. § 336(e) election is broader in some respects than the I.R.C. § 338 election; scope of the I.R.C. § 336(e) election is outside the scope of this text.

- (2) If purchasing corporation buys controlling stock interest (as defined) in another corporation and makes affirmative and timely election under I.R.C. § 338 (filing IRS Form 8023), acquisition is treated as a purchase of assets at their fair market value.
- (3) Selling corporation is treated as selling its assets on sales date at their fair market value and going out of existence for tax purposes; this may result in gain, *see supra* § [7.27](#), which could make I.R.C. § 338 election prohibitively expensive.

NOTE: There may be circumstances (the discussion of which is outside the scope of this text) when such election might be desirable, e.g., when the target entity has net operating or capital losses, is a subsidiary member of a consolidated group of corporations, or is an S corporation. For a certain type of I.R.C. § 338 election (i.e., an I.R.C. § 338(h)(10) election), the selling shareholders, as well as the buyer, must jointly make the election; accordingly, if the buyer believes it is desirable to make the election, the buyer should consider binding the selling shareholder(s) to make the election in the acquisition agreement. *See* I.R.C. § 338(h)(10); Treas. Reg. § 1.338(h)(10)-1.

- (4) Corporation files short-period tax return for period ending on sale date, showing its operating income or loss for that period, plus gain resulting from the fictional asset sale, minus any available operating loss carryovers.

- (5) Same corporation is then treated as new corporation for tax purposes, having purchased assets of “old” entity at fair market value.
- (6) New entity (same entity from corporate law standpoint) then owns assets at their new basis, just as if assets had actually been purchased at fair market value; “price” of new basis is recognition of gain.
- (7) Although selling shareholders will recognize gain on their stock sale just as if I.R.C. § 338 election had not been made, corporation (now owned by buyers) must pay tax on any appreciation in its assets as if those assets had been sold; buyer should consider this potential cost in determining the tax impact of the transaction.
- (8) If buyer or affiliate of buyer purchases any assets from target or target affiliate during defined *consistency period*, special I.R.C. rules governing such purchases should be reviewed. I.R.C. § 338(h)(4), (e)(1).
- (9) Because an I.R.C. § 338 transaction is treated as an asset acquisition, buyer cannot use net operating losses from acquired corporation (i.e., those losses of acquired corporation that might otherwise exist after calculation of gain on account of I.R.C. § 338 election).

I. Taxable Sales of Corporations and Transfers of Assets – Buyer’s Perspective [§ 7.320]

1. Upon purchase of assets from corporation, buyer is faced with precisely the same tax issues as when assets purchased from proprietorship or partnership.
2. Purchaser must allocate purchase price among acquired assets and will usually prefer to
 - a. Allocate as much of price as is feasible to assets that can be written off immediately or over shortest period of time.
 - b. Allocate as little of price as possible to assets that cannot be depreciated or amortized at all (e.g., land).
3. For reasons discussed in section [7.20](#), *supra*, purchaser may want to try to reach purchase price allocation agreement with seller.
4. Possible disadvantage of asset acquisition as compared with stock acquisition is that purchaser will not obtain tax attributes of selling corporation, most significantly, net operating losses.

J. Purchases and Sales of LLCs and LLPs [§ 7.321]

1. LLCs and LLPs generally will be treated as partnerships for federal and state income tax purposes, unless they elect to be treated as corporation. Single-member LLC will be ignored for federal and state income tax purposes unless it elects to be treated as corporation. Treas. Reg. §§ 301.7701-1 to -3.
2. If LLC or LLP is treated as partnership, tax consequences below will follow when LLC or LLP is sold and purchased (same consequences that occur on sale and purchase of partnership assets).

- a. Assuming LLC or LLP is partnership for tax purposes, corporate reorganization rules under I.R.C. § 368 and related sections do not apply, and all purchases and sales will be taxable.
- b. If assets of LLC or LLP are sold, there will be no gain or loss to LLC or LLP, and any such gain or loss (computed on asset-by-asset basis) will flow through and be taxed to LLC members or LLP partners; LLC or LLP can then be dissolved with no further tax consequences, *see supra* § [7.22](#).
- c. If LLC or LLP interests are sold, they will generally qualify as capital gain or loss to seller, but some of this may be turned into ordinary income if, at time of sale, LLC or LLP owns either *substantially appreciated inventory* or *unrealized receivables*, *see supra* § [7.22](#).
- d. When buyer of business conducted by LLC or LLP buys assets of LLC or LLP, tax consequences are same as in purchase of proprietorship or assets of partnership or corporation; major issue for buyer is allocating purchase price over types of assets that can be written off most quickly, *see supra* § [7.23](#).
- e. When buyer buys all membership interests of LLC or partnership interests of LLP, purchase is taxed in same manner as purchase of assets of LLP or LLC. Rev. Rul. 99-6, 1999-1 C.B. 432.
- f. When buyer buys some membership interests of LLC or some partnership interests of LLP, buyer obtains new tax basis for interests, but LLC or LLP basis of its assets will generally not be affected unless buyer makes election under I.R.C. § 743 and I.R.C. § 754.

Chapter 8

Organizing a Business

Timothy G. Schally

Michael Best & Friedrich LLP
Milwaukee

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 257; all references to the United States Code (U.S.C.) and Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-127 (May 16, 2022); and all references to Treasury regulations (Treas. Reg.) are current through 87 Fed. Reg. 30,092 (May 17, 2022).

NOTE: At the time of publication, the federal and state governments have taken steps, including enacting legislation, to assist businesses and individuals affected by the COVID-19 pandemic. For more information, readers are encouraged to visit the following websites: Wis. Econ. Dev. Corp., *COVID-19 Business Resources*, <https://wedc.org/programs-and-resources/covid-19-response/> (last visited May 18, 2022); Wis. Econ. Dev. Corp., *Focus Forward*, <https://wedc.org/focus-forward/> (last visited May 18, 2022).

NOTE: Governor Tony Evers signed 2021 Wis. S.B. 566 into law as 2021 Wis. Act 258 on April 15, 2022. Changes made by Act 258 have not been incorporated into this chapter. Act 258 significantly modified the state's uniform partnership law, [Wis. Stat.](#) ch. 178, and repealed and recreated the state's limited liability company (LLC) law, [Wis. Stat.](#) ch. 183. For more information on how Act 258 will affect filings, see the Wisconsin Department of Financial Institutions' website, <https://www.wdfi.org/>. For an overview of Act 258, see Adam J. Tutaj, *Wisconsin's New Business Entity Law Takes Effect Jan. 1*, State Bar of Wis. InsideTrack (Apr. 21, 2022), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=14&Issue=8&ArticleID=29056>.

I. INTRODUCTION [§ 8.322]

A. In General [§ 8.323]

This chapter discusses the principal legal and tax factors to be considered and procedures to be followed in establishing a Wisconsin proprietorship, partnership, LLC, limited liability partnership (LLP), or non-service corporation.

B. Resources [§ 8.324]

1. Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* (7th ed. 2000 & Supp.).
2. Joseph W. Boucher et al., [Organizing a Wisconsin Business Corporation: Articles, Bylaws, and Other Forms](#) (State Bar of Wis. 5th ed. 2018).
3. Joseph W. Boucher et al., [LLCs and LLPs: A Wisconsin Handbook](#) (State Bar of Wis. 7th ed. 2021 & Supp.).
4. William McKee et al., *Federal Taxation of Partnerships and Partners* (4th ed. 2007 & Supp.).

II. SELECTING FORM OF NEW BUSINESS [§ 8.325]

A. Alternatives [§ 8.326]

1. Select one form
 - a. Sole proprietorship (single owner or spouse as owner)
 - b. Partnership ([Wis. Stat.](#) ch. 178) (two or more persons sharing business profits and losses)
 - c. Corporation ([Wis. Stat.](#) ch. 180)
 - (1) C corporation (corporation taxed as separate entity)
 - (2) S corporation (corporation taxed somewhat like partnership)

NOTE: If selecting the corporate form, decide whether to use close corporation provisions, *see infra* § 8.14, para. 4. [Wis. Stat.](#) §§ 180.1801–1837.

- d. LLC ([Wis. Stat.](#) ch. 183 (repealed and recreated by 2021 Wis. Act 258))
 - (1) Generally, LLC is a corporation for nontax purposes, but it will usually be treated as a partnership or proprietorship for income tax purposes.
 - (2) Although all states now have effective LLC laws, details differ (making it important to check the laws of other states in which a Wisconsin LLC will be doing business).
 - e. LLP
 - (1) Generally, LLP is a partnership for nontax purposes, except partners are not liable personally for partnership obligations (with certain exceptions). [Wis. Stat.](#) § 178.0102(11) (2019–20).
 - (2) LLP will usually be a partnership for tax purposes.
 - f. Limited partnership ([Wis. Stat.](#) ch. 179 (repealed and recreated by 2021 Wis. Act 258))
 - (1) Limited partnership must have at least one general partner who is personally liable for the obligations of the partnership.
 - (2) Limited partners generally are not personally liable.
 - (3) Limited partnership will usually be a partnership for tax purposes.
2. Consider organizing different parts of the business as different entities to take advantage of the benefits of each entity (e.g., perhaps use C or S corporation for active parts of business; hold real estate in a separate leasing partnership or LLP).

B. Nontax Factors [§ 8.327]

- 1. Limited liability
 - a. Major distinction among forms: Sole proprietor and general partners are personally responsible for business liabilities; corporate shareholders, members of LLCs, partners in LLPs, and limited partners generally are not. [Wis. Stat.](#) § 178.0306(3m); [SCR](#) 20:5.7.
 - b. Limited liability of LLP partner is subject to the important exception that such partner will *not* be excused from personal liability for partner's own omissions, negligence, wrongful acts, misconduct, or malpractice or for such conduct on the part of any person acting under that partner's actual supervision and control (with respect to specific activity in which conduct occurred).
 - c. Limited liability, if an option, may be of little practical significance for a newly formed small business (e.g., lenders or creditors may require personal guaranties); attorneys should consider particular circumstances.
 - d. If not all investors require limited liability, limited partnership provides one alternative, *see infra* § [8.11](#).

- e. Because many states have LLP laws that (unlike Wisconsin's) do not protect partners against contract liabilities, LLP form may not be suitable for entity that will do business in other states.
2. Other nontax considerations frequently cited in standard texts as favoring the corporate form are usually either irrelevant or handled as well in partnership or proprietorship form (e.g., centralization of control and transferability of ownership interests).

C. Tax Factors [§ 8.328]

1. Projected profits

- a. If immediate profit is projected and profit is to be distributed to investors, C corporation (any corporation not electing to be S corporation) is generally a *bad* choice because profits may be taxed twice; not true for partnerships, LLPs, LLCs, or (usually) S corporations.
- b. If immediate profit is projected and profits are to be left in the business:
 - (1) C corporation may be good choice in some circumstances because, beginning in 2018, the federal income tax rate on corporate income has been reduced from a maximum of 35% to a flat 21%, which may be lower than the individual tax rate in many situations. However, for 2019–2025, individuals and other noncorporate taxpayers may qualify for a 20% deduction on certain “qualified business income” from sole proprietorships, partnerships, and S corporations, provided numerous conditions are satisfied. These rate changes and deductions generally make the choice of entity decision more complicated; a tax advisor should therefore be consulted. For more information about choice of entity decisions, see I.R.C. § 1; I.R.C. § 11; I.R.C. § 199A; the regulations promulgated thereunder; and Douglas J. Patch, Timothy G. Schally & Timothy L. Voigtman, “Choice of Entity in the Wake of Tax Reform,” 69th Annual Tax School (State Bar of Wis. 2018) (course manual available for purchase at <https://marketplace.wisbar.org>).
 - (2) Retained profits of C corporation will likely be taxed a second time when eventually distributed, even upon liquidation.
 - (3) Retained income of C corporation beyond the reasonable needs of business may be subject to accumulated-earnings tax penalty. I.R.C. § 531.
 - (4) Usually best to leave appreciating property (e.g., real estate) out of C corporation in any event, because of possible double tax when it is sold or distributed in liquidation and inability of C corporation to qualify for capital gains tax rate preference.

2. Projected losses

- a. If tax loss is anticipated, it is often best to use proprietorship, partnership, LLP, S corporation, or LLC because losses incurred by the entity can sometimes be deducted by investors on their personal tax returns; certain limitations may apply, however, especially for an investor not active in the business. I.R.C. § 465; I.R.C. § 469; I.R.C. § 704(d).

- b. For losses incurred in tax years beginning after December 31, 2017, and before January 1, 2027, the amount of loss that can be deducted by a noncorporate partner or S corporation shareholder is limited to \$250,000 per year (\$500,000 in the case of a joint return), with the excess carried forward and treated as a net operating loss. I.R.C. § 461(l); I.R.C. § 172.

NOTE: The Coronavirus Aid, Relief, and Economic Security Act (hereinafter CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020), retroactively delayed the effective date of this provision until taxable years beginning after December 31, 2020.

- c. Losses incurred by C corporation cannot be deducted by investors; such losses may, however, be carried forward and deducted by corporation against its profits in later years (and in certain limited situations may be carried back), subject to certain limitations. I.R.C. § 172; [Wis. Stat.](#) §§ 71.26(4), 71.05(8)(a), (b), 71.255(6); Tax Release, 178 Wis. Tax Bull. 10–12 (Jan. 2013); 180 Wis. Tax Bull. 10 (July 2013).

NOTE: The CARES Act, Pub. L. No. 116-136, 134 Stat. 281, generally allows operating losses incurred in taxable years beginning after December 31, 2017, and before January 1, 2021, to be carried back for five tax years. Wisconsin did not adopt this CARES Act provision.

3. Flexibility and risks

- a. Partnership, LLP, proprietorship, or LLC is usually more flexible and less risky from a tax viewpoint than corporation.
- b. LLC or LLP is often a better choice than partnership or S corporation because, unlike partnership, all LLC members and LLP partners have limited liability (with exceptions discussed above) and all can participate in management, and unlike S corporation, there are no restrictions on types of shareholders, classes of stock, etc.
- c. After the business has been operating for a while, it is usually easier to change from partnership, LLP, proprietorship, or LLC to corporation than vice versa.
- d. If preferable form is unclear, usually it is best to use noncorporate form because that decision can later be modified; reverse might not be true.
- e. The *reorganization provisions* in I.R.C. § 368 apply only to corporations (i.e., they do not apply to partnerships and entities, such as LLCs, that are treated as partnerships for income tax purposes). Thus, owners of partnership may not be able to dispose of their business on a tax-deferred basis pursuant to I.R.C. § 368 and related provisions.

4. Real estate transfer fee

- a. When real estate is involved, the real estate transfer fee should also be considered. [Wis. Stat.](#) §§ 77.21–.30.
- b. Before July 1, 2016, conversion of an existing partnership to LLC might have involved a real estate transfer fee. *Wolter v. Wisconsin Dep't of Revenue*, 231 Wis. 2d 651 (Ct. App. 1999). Conversion of a partnership to an LLC on or after July 1, 2016, may qualify for fee exemption under [Wis. Stat.](#) § 77.25(6m) (2019–20).

- c. Conversion of existing partnership to LLP is exempt from real estate transfer fee. [Wis. Stat.](#) § 77.25(6d).
 - d. Transfer of real property pursuant to merger or consolidation of corporations, nonstock corporations, LLCs, limited partnerships, or any combination of these forms is generally exempt from real estate transfer fee. [Wis. Stat.](#) §§ 77.21(1e), 77.25(6).
 - e. Transfer of real estate pursuant to a statutory conversion of a business entity (defined generally to include partnerships, limited partnerships, stock and nonstock corporations, and LLCs) is generally exempt if the ownership interests in the new entity are identical to the ownership interests in the original entity. [Wis. Stat.](#) § 77.25(6m) (2019–20).
5. Self-employment taxes
- a. General partner's distributive share of partnership income will generally be net income or loss from self-employment. I.R.C. § 1402(a).
 - b. Limited partner's distributive share of partnership income is generally exempt from self-employment tax. I.R.C. § 1402(a)(13).
 - c. Exemption may be available for some LLC members, but application of the exemption to LLP is still unclear. *Hardy v. Commissioner*, T.C. Memo. 2017-16; *Renkemeyer, Campbell & Weaver, LLP v. Commissioner*, 136 T.C. 137 (2011); *Methvin v. Commissioner*, T.C. Memo. 2015-81, I.R.S. Service Center Advice (CCA) 201436049 (May 20, 2014), *aff'd*, 653 F. App'x 616 (10th Cir. 2016).
6. Employee benefits—any significant employee benefit advantages of corporate form have been largely eliminated and are usually not significant in deciding whether to incorporate new business.

III. ORGANIZING A SOLE PROPRIETORSHIP OR PARTNERSHIP [§ 8.329]

A. Sole Proprietorship [§ 8.330]

- 1. In general, sole proprietorship is an unincorporated business owned solely by one person.
- 2. Nontax considerations
 - a. Business name
 - (1) No formal registration required.
 - (2) Trade name principles apply.
 - b. Compliance with state and local zoning, licensing, and regulations
 - c. Liability and casualty insurance coverage recommended.
 - d. If proprietor has employees, worker's compensation and unemployment insurance coverage may be needed. [Wis. Stat.](#) chs. 102, 108.

3. Tax considerations
 - a. Formation of proprietorship has no particular income tax ramifications.
 - b. Income and expenses of business are reported on proprietor's regular personal income tax return. I.R.C. § 6012.
 - c. Might be liable for self-employment tax. I.R.C. § 6017.
 - d. If proprietor has employees, he or she must arrange for federal and Wisconsin employment tax withholding. I.R.C. § 3402; [Wis. Stat.](#) § 71.64.

B. Partnership [§ 8.331]

1. Definition and purpose: *Partnership* is an association of two or more persons to carry on a business for profit as co-owners. [Wis. Stat.](#) § 178.0102(11) (2019–20).
2. Nontax considerations
 - a. No particular document is required to form partnership.
 - (1) However, partnership agreement, *see infra* para f., is usually desirable for tax and business reasons.
 - (2) Without partnership agreement, Wisconsin Uniform Partnership Act determines the rights and duties of partners among themselves and with third parties. [Wis. Stat.](#) ch. 178.
 - (3) Statutory rules can often be varied by partnership agreement. [Wis. Stat.](#) § 178.0401.
 - b. Use appropriate documents (e.g., deeds and bills of sale) to transfer property from partners to partnership if partnership is to be the owner.
 - c. Open partnership checking account with appropriate signatory authority; deposit money contributed to partnership.
 - d. Transfer contracts (e.g., leases) with third parties into the name of partnership; get approval of third parties if necessary.
 - e. Also consider the following:
 - (1) Name of partnership (name registration is not required)
 - (2) State and local zoning, licensing, and regulations
 - (3) Insurance coverage—unemployment insurance and worker's compensation may be necessary.

- (4) If partnership has employees, must arrange for federal and state employment tax withholding.
 - (5) Real estate transfer fee will be due if real estate is transferred to partnership and if all partners are not related to each other in the specified manner. [Wis. Stat. § 77.25\(15m\)](#).
- f. If partnership agreement is used, include the following:
- (1) Names and addresses of partners
 - (2) Name of partnership
 - (a) Although no formal state registration or permission is required, some names may present problems with trade law, trade name, or unfair competition.
 - (b) If choice of name is significant (i.e., will entail significant investment or is otherwise very important to business success), search the internet, telephone books, business directories, etc., and consult a trademark lawyer.
 - (3) Purpose and location of partnership business
 - (4) Capital contributions to be made by partners
 - (a) Date by which contributions are to be made
 - (b) If property is other than money, nature of property and method of contribution (warranty deed, etc.)
 - (5) Services, if any, to be rendered by partners
 - (6) Accounting system: Often preferable to have separate capital accounts and drawing accounts for each partner.
 - (7) Division of profits and losses: Profits and losses can be allocated in a different manner than capital contributions; desirable to specify this division.
 - (8) Distribution of cash flow: Current cash flow can be distributed in a different manner than profits and losses, so cash distribution should be described.
 - (9) Administrative provisions
 - (a) Who is to manage partnership affairs
 - (b) How partnership votes are to be taken
 - (c) Whether partners are expected to devote particular amount of time to partnership affairs
 - (d) Whether salaries are to be paid to partners

- (e) Which partners have check-signing authority
- (10) Terms on retirement, withdrawal, expulsion, and death: If no partnership agreement, or if partnership agreement is silent on the subject, Wisconsin partnership law contains provisions regarding effect of these events on partnership. [Wis. Stat. § 178.0801](#).
 - (a) Partnership assets probably must be sold, and proceeds distributed, unless parties can negotiate terms.
 - (b) Dissolving partnership is usually undesirable, so it may be preferable to cover these contingencies in agreement, establishing buyout procedures, terms, and price.
- (11) Sales to third parties. [Wis. Stat. § 178.0503](#).

Because sale of partnership interest neither terminates partnership nor makes purchaser a partner (unless other partners agree), it may not be necessary to provide for this contingency; however, purchaser will be entitled to a share of profits, and if this is undesirable, sales can be restricted.
- (12) Dissolution procedure
 - (a) Procedures to be followed in dissolution of partnership are detailed in Wisconsin Uniform Partnership Act. [Wis. Stat. §§ 178.0801–.0810](#).
 - (b) Partnership agreement must discuss procedures only if parties prefer to depart from statutory procedures.
- g. Because partnership interests may become marital property, agreement should also deal with spousal interests.

3. Tax considerations

- a. Partnership is generally not a taxable entity. I.R.C. § 701.
 - (1) Each partner's share of partnership profits and losses is taxed to or deductible by that partner, subject to limitations. I.R.C. § 704(b); I.R.C. § 465; I.R.C. § 469.
 - (2) Loss can be deducted only up to partner's basis in partnership interest; that basis includes his or her share of partnership liabilities. I.R.C. § 704(d); I.R.C. § 722; I.R.C. § 752.
 - (3) Loss deductibility also limited by *at-risk* and *passive loss* rules. I.R.C. § 465; I.R.C. § 469.
 - (4) For *excess business losses*, I.R.C. § 461(l)(3)(A), incurred in tax years beginning after December 31, 2017, and before January 1, 2027, the amount of loss that can be deducted by a noncorporate partner is limited to \$250,000 per year (\$500,000 in the

case of a joint return), with the excess carried forward and treated as a net operating loss. I.R.C. § 461(l); I.R.C. § 172.

NOTE: The CARES Act, Pub. L. No. 116-136, 134 Stat. 281, retroactively delayed the effective date of this provision until taxable years beginning after December 31, 2020.

- (5) Partner's share of partnership profits and losses is usually determined by partnership agreement; if no agreement, in accordance with partner's *interest in the partnership*. I.R.C. § 704(b).
 - (6) Partnership agreement may provide for partnership's profits and losses to be allocated among partners differently from capital contributions or even from current cash distributions.
 - (7) Allocations in partnership agreement are followed for tax purposes only if they have a *substantial economic effect*; otherwise, in accordance with partner's interest in the partnership. I.R.C. § 704(b).
 - (8) Federal income tax legislation enacted in 2015 but generally effective for tax years beginning after December 31, 2017, significantly changed the procedures relating to audits of partnerships (and entities treated as partnerships) for income tax purposes. These changes provide that the partnership itself may be liable in certain situations for audit adjustments, although certain actions can be taken so that the partnership adjustments apply at the partner level. Accordingly, partnership agreements should address procedures and elections relating income tax audits of the partnership, including impact on the partnership and partners for the current year and partners (both current and former) during the tax year(s) under audit. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101, 129 Stat. 584.
 - (9) Effective for tax years beginning in 2019, entities treated as partnerships for Wisconsin income tax purposes may make an election on a year-by-year basis to be taxed at the entity level, rather than have the entity's income, losses, and deductions flow through to the owners. *See* 2017 Wis. Act 368; Thomas J. Nichols & James W. DeCleene, *A New Pass-Through Entity Tax-Saving Opportunity*, InsideTrack (State Bar of Wis., Madison, Wis.), Jan. 16, 2019, <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=11&Issue=1&ArticleID=26772>.
- b. Tax consequences of sale or liquidation
- (1) May differ depending on whether buyout is a purchase by other partners or by the continuing partnership. I.R.C. § 736; I.R.C. § 741; *see e.g.* Michelle M. Jewett, *A Model of Complexity and Uncertainty: Redemptions of Partnership Interests*, 72 Tax Law. 337–80.
 - (2) Consider including buyout provisions in partnership agreement.
- c. If the only contribution made by partners is money, there is no gain or loss to partners or partnership (assuming fair market value of partnership interest received for money is equal

to money contributed); each partner's initial basis in partnership interest equals amount contributed. I.R.C. § 721; I.R.C. § 722.

- d. If partner contributes property other than money, there is usually no gain or loss to partners or partnership. I.R.C. § 721.
- (1) Contributing partner's initial basis in partnership interest equals that partner's adjusted tax basis in contributed property; partnership's initial tax basis in contributed property is generally the same as contributing partner's. I.R.C. § 722; I.R.C. § 723.
 - (2) If the tax basis of contributed property differs from its fair market value, any such gain or loss recognized by partnership when property is sold by partnership must be allocated to its contributor for tax purposes; depreciation on such property may have to be allocated to other partners. I.R.C. § 704(c).
 - (3) If contributed property is encumbered by liability (mortgage, etc.), contributing partner might have gain at time of contribution, depending on that partner's tax basis in property, amount of liability, and percentage of interest in partnership. I.R.C. § 752.
 - (4) Special rules apply to appreciated property contributed to a partnership that includes as partners non-U.S. persons. I.R.C. § 721(c); T.D. 9814, 82 Fed. Reg. 7582 (Jan. 19, 2017).
 - (5) Distributions by a partnership of property (other than money) to its partners are subject to a number of special rules outside the scope of this outline, including I.R.C. § 731, I.R.C. § 732, and I.R.C. § 737.
- e. If partner receives partnership interest in return for personal services
- (1) Partner may have to recognize compensation income equal to the value of partnership interest received (usually true only if service partner obtains immediate capital interest, i.e., an interest in liquidation proceeds that would be generated if all of the partnership's assets were sold for fair market value). Rev. Proc. 93-27, 1993-2 C.B. 343; Rev. Proc. 2001-43, 2001-34 I.R.B. 191; *see also* I.R.C. § 1061; I.R.S. Notice 2005-43, 2005-24 I.R.B. 1221.
 - (2) Amount of any income and time of recognition depends on the following:
 - (a) Nature of partnership interest (e.g., whether partner receives capital interest or merely an interest in future profits)
 - (b) Presence of any restrictions on that interest. I.R.C. § 83.
 - (c) Fair market value of interest
 - (3) If income is recognized, there may be a correlative deduction at partnership level, depending on the nature of services contributed. *See* I.R.C. § 162.

- (4) Note that special I.R.C. § 83 rules may apply if the capital or profits interest is subject to a substantial risk of forfeiture. I.R.S. Notice 2005-43, 2005-24 I.R.B. 1221.
- f. In general, partnership must adopt the same taxable year as that of the partners owning a majority interest in the capital and profits of the partnership; if majority are not on the same tax year, then partnership must adopt the same taxable year as that of all its principal partners (those holding at least five-percent interest in partnership capital and profits); if principal partners are on different taxable years, partnership must adopt, from among those years, the taxable year that will result in the “least aggregate deferral” of income to the partners; exception to these rules applies if partners can convince IRS that sufficient business purpose exists for different year. *See* I.R.C. § 706; Treas. Reg. § 1.706-1.

C. Limited Partnership [§ 8.332]

NOTE. [Wis. Stat.](#) ch. 179 was repealed and recreated by 2021 Wis. Act 258. All references in section 8.11 to statutes in [Wis. Stat.](#) ch. 179 are to the chapter text before it was repealed and recreated.

1. Nontax considerations

- a. Limited partners generally are not personally liable for obligations of their partnership, unlike general partners (in either partnership or limited partnership). [Wis. Stat.](#) § 179.23.
 - (1) Every limited partnership must have at least one general partner who is personally liable. [Wis. Stat.](#) §§ 179.01(7), 179.33.
 - (2) General partner may be a corporation or an LLC, in which event its shareholders and members are usually protected from partnership liabilities.
 - (3) If limited partner participates in the control of business, limited partner is liable only to persons who transact business with limited partnership and reasonably believe limited partner is general partner. [Wis. Stat.](#) § 179.23(1).
 - (4) If limited partner knowingly permits his or her name to be used in the name of the limited partnership, limited partner is liable to creditors who extend credit to limited partnership without actual knowledge that limited partner is not a general partner. [Wis. Stat.](#) § 179.23(4).
 - (5) Wisconsin Uniform Limited Partnership Act lists powers that can be given to limited partners without causing loss of protection. [Wis. Stat.](#) § 179.23(2).
- b. To form limited partnership, file certificate of limited partnership. [Wis. Stat.](#) § 179.11.
 - (1) Complete Department of Financial Institutions Form 302 (Apr. 2018), <https://www.wdfi.org/resources/indexed/site/corporations/dfi-corp-302.pdf>.
 - (2) Contents
 - (a) Partnership name, *see infra* para. d.

- (b) Address of record office, *see infra* para. e.
- (c) Name and address of agent for service of process, *see infra* para. e.
- (d) Name and business address of each general partner
- (e) Latest date upon which limited partnership will dissolve
- (f) Any other matters general partners desire to include

(3) Procedure

- (a) All general partners must sign original certificate; certificate of amendment must be signed by at least one general partner and by each other general partner designated in certificate as new general partner. [Wis. Stat.](#) § 179.14(1r)(a), (b).
- (b) Person may sign certificate by attorney-in-fact; however, if certificate relates to admission of general partner, power of attorney must specifically describe admission. [Wis. Stat.](#) § 179.14(2).

NOTE: Pursuant to 2001 Wis. Act 44, which took effect on October 1, 2002, certificates and other limited partnership documents may be filed in electronic format. As of May 20, 2022, however, the Department of Financial Institutions (DFI) has provided for online filing only of certificates of conversion and articles of merger.

- (c) Person must send two signed copies and \$70 fee to DFI. [Wis. Stat.](#) §§ 179.11, 179.16.

NOTE: The DFI, by rule, may specify a larger fee for certificates filed in paper format, although the DFI had yet to do so as of May 20, 2022.

- (d) DFI files one copy; returns other copy to filing party. [Wis. Stat.](#) § 179.16.
- (e) Absent a contrary partnership agreement provision, general partners must send copy to each limited partner. [Wis. Stat.](#) § 179.19.
- (f) Partnership formed at filing of certificate or any later date specified in certificate. [Wis. Stat.](#) § 179.11(2).
- (g) Certificate may be amended, and must be amended upon certain occurrences (e.g., within 60 days after admitting new general partner). [Wis. Stat.](#) § 179.12.

c. Partnership agreement should contain all material terms, including the following:

- (1) Terms set forth in certificate of limited partnership, *see supra* para. b.
- (2) Capital contributions to be made by partners, including times at which any additional contributions will be required. [Wis. Stat.](#) §§ 179.41, 179.42.

- (3) Sharing of profits and losses. [Wis. Stat.](#) § 179.43.
 - (4) Interim distributions. [Wis. Stat.](#) § 179.51.
 - (5) Admitting additional partners. [Wis. Stat.](#) §§ 179.21, 179.31.
 - (6) Voting rights of partners. [Wis. Stat.](#) §§ 179.22, 179.35.
 - (7) Withdrawal rights of partners. [Wis. Stat.](#) §§ 179.53, 179.52.
 - (8) Right to assign partnership interest. [Wis. Stat.](#) § 179.62.
 - (9) Terms upon withdrawal, death, bankruptcy, or removal of general partners. [Wis. Stat.](#) § 179.32.
- d. Per [Wis. Stat.](#) § 179.02, name of limited partnership
- (1) Must contain, without abbreviation, the words *limited partnership*.
 - (2) With certain exceptions, cannot contain name of limited partner.
 - (3) Exclusive right to use name may be reserved through DFI by filing application (in duplicate) or by making telephone application with applicable fee. [Wis. Stat.](#) § 179.03.
- e. Every limited partnership must at all times maintain agent for service of process and record office in Wisconsin. [Wis. Stat.](#) § 179.04.
- (1) Agent may or may not be partner.
 - (2) Office may or may not be partnership's principal place of business.
 - (3) Per [Wis. Stat.](#) § 179.05, office must maintain
 - (a) Names and business addresses of each partner, separately identifying limited partners and general partners in alphabetical order
 - (b) Copy of certificate of limited partnership (with amendments)
 - (c) Copies of all tax returns for the three most recent years
 - (d) Copy of any partnership agreement and of any financial statements for the three most recent years
 - (e) Certain other information, unless contained in effective written partnership agreement or certificate of limited partnership.
- f. Sale of limited partnership interests. See [Wis. Stat.](#) § 179.08.
- (1) Constitutes sale of *securities* for securities law purposes.

- (2) May have to be registered with both Wisconsin Commissioner of Securities and federal Securities and Exchange Commission.
 - (3) Exemption from registration may be available under securities laws. Securities Act of 1933, § 4, 15 [U.S.C.](#) § 77d; [Wis. Stat.](#) §§ 551.22, 551.23.
2. Tax considerations—Tax consequences of forming limited partnership are generally the same as for general partnership, *see supra* § 8.10, para. 3.

EXCEPTION: A limited partner may not be able to take any share of partnership debts into account in determining the tax basis of its partnership interest, although this may not be true for nonrecourse (exculpatory) liabilities. I.R.C. § 752; Treas. Reg. § 1.752-2(a).

D. Limited Liability Partnership [§ 8.333]

1. Nontax considerations
 - a. Per [Wis. Stat.](#) § 178.0306(3), all partners in LLP are protected from personal liability for obligations of partnership, with important exceptions listed below.
 - b. An LLP partner will be liable personally for partnership obligations to the extent that partner has signed personal guaranty or similar undertaking.
 - c. An LLP partner will be liable personally for that partner's own omissions, negligence, wrongful acts, misconduct, or malpractice, as well as for omissions, negligence, wrongful acts, misconduct, or malpractice of any person acting under that partner's actual supervision or control (in specific activity in which conduct occurred). [Wis. Stat.](#) § 178.0306(3m).
 - d. Unlike many other states, Wisconsin's LLP law extends to obligations arising out of partnership contracts as well as torts, with exceptions listed above.
 - e. LLP's assets remain subject to all claims against LLP.
 - f. Although principal users of LLPs are professionals such as attorneys and accountants, LLP form of doing business may be suitable for other businesses as well, especially real estate.
 - g. Multistate businesses should give thought to the problems created by narrower protection afforded to LLPs under some state LLP laws.
 - h. To become LLP, new or existing partnership must file statement of qualification with DFI (form available online at <https://www.wdfi.org/resources/indexed/site/corporations/dfi-corp-602.pdf> (Apr. 2020)). [Wis. Stat.](#) § 178.0901.

NOTE: Pursuant to 2001 Wis. Act 44, which took effect on October 1, 2002, statements of qualification and other LLP documents may be filed in electronic format, although as of May 20, 2022, the DFI had yet to implement procedures for doing so.

- i. Filing fee is \$100. [Wis. Stat.](#) § 178.0901.

NOTE: The DFI may require a larger fee for statements of qualification filed in paper format, although as of May 20, 2022, the DFI had yet to do so.

- j. Pursuant to [Wis. Stat.](#) §§ 178.0108 and 178.0901(2019–20), statement of qualification must contain
- (1) Name that meets requirements of [Wis. Stat.](#) § 178.0902 (2019–20), including requirement that such name include *L.L.P.*, *LLP*, *Registered Limited Liability Partnership*, or *Limited Liability Partnership*. [Wis. Stat.](#) § 178.0901(3).
 - (2) Street and mailing address of principal office
 - (3) Street address of registered agent and name of registered agent for service of process
 - (4) Statement that partnership elects to become LLP
 - (5) Any other information that partnership determines to include
 - (6) Statement of qualification must be signed by partners authorized by partnership.
- k. Other than statement of qualification requirements and liability issues, the nontax considerations applicable to partnerships in section [8.10](#), *supra*, apply to LLPs.

2. Tax considerations

- a. Unless it elects otherwise (discussed below with respect to LLCs), LLP generally will be taxed as partnership; if so,
- (1) No special tax election is necessary.
 - (2) LLP generally is not a taxable entity; all profits and losses flow through to members, subject to certain limitations and conditions. I.R.C. §§ 701–777.
 - (3) Losses may be deducted only up to partners’ bases in their LLP interests; as with partnership and LLC (and unlike S corporation), basis will include partner’s share of LLP liabilities, with such share most commonly equaling partner’s share of LLP profits. I.R.C. § 704; I.R.C. § 752.
 - (4) Loss deductions for LLP partners are also limited by at-risk and passive loss rules. I.R.C. § 465; I.R.C. § 469.
 - (5) For *excess business losses*, I.R.C. § 461(l)(3)(A), incurred in tax years beginning after December 31, 2017, and before January 1, 2027, the amount of loss that can be deducted by a noncorporate partner is limited to \$250,000 per year (\$500,000 in the case of a joint return), with the excess carried forward and treated as a net operating loss. I.R.C. § 461(l); I.R.C. § 172.

NOTE: The CARES Act, Pub. L. No. 116-136, 134 Stat. 281, retroactively delayed

the effective date of this provision until taxable years beginning after December 31, 2020.

- (6) Partners' respective shares of LLP profits and losses are determined by partnership agreement, as long as allocation has a substantial economic effect; percentages need not be based on respective contributions. I.R.C. § 704(b).
 - (7) Federal income tax legislation enacted in 2015 but generally effective for tax years beginning after December 31, 2017, significantly changed the procedures relating to audits of partnerships (and entities treated as partnerships) for income tax purposes. These changes provide that under certain circumstances the partnership itself may be liable for audit adjustments, although actions can be taken so that the partnership adjustments apply at the partner level. Accordingly, partnership agreements should address procedures and elections relating income tax audits of the partnership, including impact on the partnership and partners for the current year and partners (both current and former) during the tax year(s) under audit. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101, 129 Stat. 584.
 - (8) Generally, there is no gain or loss on contribution of property to LLP; if property is encumbered by liabilities, however, there may be tax consequences; also, under I.R.C. § 721(c), Treasury Department is authorized to provide by regulation that general nonrecognition rule does not apply to gain realized on transfer of property to partnership if gain, when recognized, will be includible in gross income of person other than U.S. person, *see supra* § [8.10](#), para. 3.d.(4). I.R.C. § 721.
 - (9) If member receives LLP interest for services, there may be tax consequences, both for that member and others, *see supra* § [8.10](#), para. 3.e.
- b. Classification of LLP as partnership for tax purposes generally involves the same issues as for LLC, discussed in section [8.24](#), *infra*. I.R.C. § 701; Treas. Reg. § 301.7701-2.

IV. ORGANIZING A CORPORATION [§ 8.334]

A. Preliminary Nontax Considerations [§ 8.335]

1. Preincorporation agreement, setting forth terms on which investors have agreed, may be desirable if terms are complex or if there is to be a delay in formalization.
2. State of incorporation—for new small business with all or most operations to be conducted in Wisconsin, there is no particular advantage in incorporating under laws of another state.
3. Name
 - a. Check availability of chosen name before filing articles of incorporation, *see infra* § [8.15](#), and before arranging for signs, letterhead, advertising, etc.
 - (1) DFI will give information
 - (a) By telephone—does not include filings for previous few days.
 - (b) By mail—completely up to date.

- (c) On the internet at <https://www.wdfr.org/apps/CorpSearch/Search.aspx?> (last visited May 18, 2022) (the Corporate Registration Information System)—completely up to date.
 - (2) May be desirable to check telephone and business directories and trademark lists.
 - b. After name is chosen, the exclusive right to use the name may be reserved with DFI; send application on Form 1 or make telephone application with applicable fee; name reserved for 120 days.
- 4. Close corporation statutes ([Wis. Stat.](#) §§ 180.1801–.1837)
 - a. Determine whether business should be organized under Wisconsin close corporation law or “regular” corporate provisions.
 - b. Close corporation law is available to any corporation with 50 or fewer shareholders.
 - c. Close corporation has the following advantages over regular corporation:
 - (1) Share transfers (allowed under regular corporate law), with certain exceptions, are barred without the written consent of all shareholders holding voting stock. [Wis. Stat.](#) § 180.1805 (2019–20).
 - (2) Articles may provide that there will be no board of directors; board is required under regular corporate law. [Wis. Stat.](#) §§ 180.1821, 180.0801.
 - (3) Articles may do away with annual meeting, which is not possible under regular law unless the corporation is registered under Investment Company Act of 1940 and articles or bylaws so provide. [Wis. Stat.](#) §§ 180.1827, 180.0701.
 - (4) Law grants certain rights to successor of deceased shareholder, which articles may or may not adopt; no such provision in regular law. [Wis. Stat.](#) § 180.1829.
 - (5) Articles or shareholder agreement may give any shareholder the right to dissolve corporation; not permissible under regular law. [Wis. Stat.](#) § 180.1831.
 - (6) Courts are given broad relief powers upon petition of aggrieved shareholder; powers narrower under regular law. [Wis. Stat.](#) §§ 180.1833, 180.1300–.1331.
 - (7) Failure of close corporation to observe usual corporate formalities cannot be grounds for imposing personal liability on shareholders for obligations of corporation; regular law is unclear as to the effect of these informalities. [Wis. Stat.](#) § 180.1835.
 - d. Close corporation law provides more significant degree of informality and flexibility than found under regular corporate law; however, most benefits are of minor importance.
 - (1) Most corporations and many attorneys prefer regular corporate law, which enables more individual tailoring.

- (2) Subsequent discussion assumes use of regular corporate law.

5. Stock

- a. Determine classes or series of stock and number of shares of each class or series that corporation is authorized to issue.
 - (1) Consider number of shares that actually will be issued.
 - (2) Consider filing fee, *see infra* § 8.15, para. 3.
- b. Determine whether to use par value or no par value stock; no longer necessary to provide in articles; par value is irrelevant except:
 - (1) Possible impact of former [Wis. Stat.](#) § 180.0622(2)(b), which imposed liability on shareholders for unpaid employee compensation, limited to par value of shares or to total consideration paid for shares if no par value.

NOTE: [Wis. Stat.](#) § 180.0622(2)(b) was repealed, effective for debts incurred on or after June 14, 2006, by 2005 Wis. Act 474.

- (2) Possible impact of par value on fees incurred when qualifying to transact business in a foreign state.

NOTE: Because of the above considerations, nominal par value is recommended.

- c. Shares may be issued without certificates. [Wis. Stat.](#) § 180.0626.
- d. Under [Wis. Stat.](#) § 180.0621, board of directors may authorize shares to be issued for consideration of any intangible or tangible property, including
 - (1) Cash
 - (2) Promissory notes
 - (3) Services performed
 - (4) Contracts for services to be performed
 - (5) Other securities of the corporation

NOTE: A corporation may place in escrow those shares issued either for a contract for future services or a promissory note or make other arrangements to restrict the transfer of shares until the services are performed or the note is paid.

B. Articles of Incorporation [§ 8.336]

1. First formal step in organizing corporation is to prepare the articles of incorporation. [Wis. Stat.](#) § 180.0202.

2. No particular form required, but articles must include certain information, *see infra* para. 7., and DFI/CCS/Corp Form 2 (Feb. 2018), <https://www.wdfi.org/resources/indexed/site/corporations/dfi-corp-2.pdf>, can be used.
3. Articles (one original) must be sent to DFI; filing fee is \$100. [Wis. Stat.](#) § 180.0122 (2019–20).

NOTE: Online filing also is available at <https://wdfi.org/apps/corpformation/directions.aspx?type=01> (last visited May 18, 2022).

4. Recording fee not required.
5. Unless a delayed effective date and time is specified, articles are effective at close of business on day received by DFI for filing. [Wis. Stat.](#) § 180.0123.
 - a. DFI then issues certificate of incorporation.
 - b. Corporation may transact business on the date articles become effective.
6. Expedited processing—for an additional \$25 fee, articles will be acted on by the close of business the first business day following the date of receipt of the request (in practice, may take up to three to five days when DFI workload is heavy, such as at quarter end or year end). [Wis. Stat.](#) §§ 180.0122(4) (2019–20), 182.01(4).
7. Contents, per [Wis. Stat.](#) § 180.0202, must include all the following:
 - a. Statement that corporation is incorporated under [Wis. Stat.](#) ch. 180
 - b. Corporate name
 - (1) Must contain word or abbreviation of *corporation*, *incorporated*, *company*, or *limited*. [Wis. Stat.](#) § 180.0401 (2019–20).
 - (2) Must generally be distinguishable from other names in DFI’s records.
 - c. Period of existence—unnecessary to include in articles; unless articles provide otherwise, corporation has perpetual duration.
 - d. Corporate purpose—unnecessary to include in articles; corporation may engage in any lawful business unless more limited purpose is set forth in articles. [Wis. Stat.](#) § 180.0302.
 - e. Description of authorized shares
 - (1) If only one class of stock, include number of authorized shares; if any class is to be divided into series, include descriptions as for para. (2), *infra*. [Wis. Stat.](#) § 180.0202(1)(c), (e).
 - (2) If more than one class of stock, must designate each class, number of shares in each class, and, before their issuance, a statement of preferences, limitations, and relative rights of shares of each class. [Wis. Stat.](#) § 180.0202(1)(d).

- (3) Board of directors may, in lieu of above and to the extent provided in articles, create one or more classes or series within a class and, for any class or series, may determine preferences, limitations, and relative rights, in whole or in part, before issuing any shares. [Wis. Stat.](#) § 180.0602.
- f. Any provision granting or limiting *preemptive rights* to shareholders—preemptive rights are rights of each shareholder to acquire his or her proportionate share of newly issued stock; right does not exist under Wisconsin law unless provided in articles. [Wis. Stat.](#) §§ 180.0202(2), 180.0630.
- g. Registered office and agent—include street address and county of initial registered office, as well as name of initial registered agent at address.
- h. Directors
 - (1) Number, manner of determining number, or provision that number or manner is to be determined in corporate bylaws.
 - (2) Names of directors may, but need not, be included.
 - (3) Only one director is needed.
 - (4) Statement of whether cumulative voting is permitted. [Wis. Stat.](#) § 180.0728.
- i. Action by shareholders may be taken without a meeting by those shareholders with voting power necessary to take action at meeting at which all shares entitled to vote were present and voted if provided in articles. [Wis. Stat.](#) § 180.0704(1)(b).
- j. Incorporator. [Wis. Stat.](#) § 180.0201.
 - (1) Name and street address
 - (2) May be any person; need not be subscriber; lawyer frequently serves as incorporator.
 - (3) Must sign and acknowledge all originals of articles.
- k. Name of person drafting document. [Wis. Stat.](#) § 182.01(3).
- l. Any other provisions parties deem appropriate.

C. Other Nontax Considerations [§ 8.337]

- 1. Subscription agreement
 - a. Not legally required for subscribers to incorporate stock to enter into subscription agreement but may be a desirable way to describe details of organization.
 - (1) Amount to be contributed by each subscriber
 - (2) Time by which subscription to be paid

- (3) Description of any noncash property to be contributed and method of contribution (quitclaim, warranty deed, etc.)
 - (4) Description of any services to be rendered in return for stock
 - (5) Securities laws representations
 - b. Subscription agreement should be signed by all subscribers.
 - c. Preincorporation subscription agreements are deemed accepted upon filing of articles of incorporation. [Wis. Stat.](#) § 180.0620(1)(b).
 - d. Subscription agreement entered into after incorporation is contract between subscriber and corporation.
2. Organization of corporation. [Wis. Stat.](#) § 180.0205.
 - a. If initial directors are named in articles, a directors' organizational meeting must be held at the call of majority of directors to complete corporation's organization by appointing officers and carrying on any other business.
 - b. If initial directors are not named in articles, incorporator(s) must hold an organizational meeting to either
 - (1) Elect directors and complete organization of corporation, or
 - (2) Elect directors who will complete organization of corporation.
 - c. Action by directors or incorporators may be taken without a meeting upon the signed unanimous consent of directors or incorporators. [Wis. Stat.](#) § 180.0821 (2019–20).
 - d. The following actions, usually taken by directors (but can be taken by incorporators), typically complete the organization of the corporation:
 - (1) Appoint officer(s)

NOTE: A single individual may hold any and all offices.
 - (2) Accept postincorporation subscriptions and call preincorporation subscriptions (i.e., request that subscribers contribute amounts specified in subscription agreement)
 - (3) Authorize corporate payment of preorganization expenses
 - (4) Approve stock certificate form and seal (if any)
 - (5) Adopt fiscal year and accounting method
 - (6) Adopt depository resolution required by bank to open corporate account

- (7) Approve any key contracts to be made (lease, bank borrowing, shareholders' agreement, etc.)
 - (8) Determine portion of any consideration received for no par value stock that will be treated as stated capital
 - (9) Adopt bylaws, if desired
 - (10) Determine whether consideration received for shares to be issued is adequate
3. Stock certificates and formal corporate minutes. [Wis. Stat.](#) §§ 180.0626, 180.1601.
 - a. Not required but desirable; attorney should order certificates and minutes book as soon as possible.
 - b. First minutes usually of initial meetings of directors.
 - c. Attorney may complete stock certificates and stock register; get signatures of appropriate officer(s).

NOTE: Only one officer must sign certificates. [Wis. Stat.](#) § 180.0625(3).
 - d. Certificates must refer to any shareholder agreement or *buy-sell agreement*, *see infra* §§ [8.25–.27](#); often handled with a legend on back of certificate stating that transfer of shares is subject to agreement and that copy of agreement is available at corporate offices.
 4. Property to be transferred to new corporation
 - a. Use appropriate documentation (deed, bill of sale, etc.).
 - b. If operating business is to be incorporated, transfer licenses, permits, third-party contracts, etc.
 5. Miscellaneous licenses, permits, etc.
 - a. To engage in retail sales, corporations must obtain sales tax seller's permit; to obtain, file Department of Revenue Form BTR-101 (revised Oct. 2021), <https://www.revenue.wi.gov/TaxForms2017through2019/btr-101.pdf>, which is also used to obtain certain other tax registrations.
 - b. If business has employees, arrange for unemployment insurance and worker's compensation as well as state and federal employment tax withholding.
 - c. Obtain federal and state tax identification numbers; federal EIN is obtained by filing IRS Form SS-4 (revised Dec. 2019), <https://www.irs.gov/pub/irs-pdf/fss4.pdf>, and Wisconsin tax registrations generally are obtained by filing Department of Revenue Form BTR-101, *see supra* para. a.
 - d. Check for local and state zoning, licensing, and other requirements.

6. Federal and state securities law requirements—because incorporation involves sale of securities to investor, check if sale is exempt from securities law registration requirements and whether any procedures or filings are necessary to qualify for exemption. [Wis. Stat.](#) ch. 551; Securities Act of 1933, as amended.
7. Director liability and indemnification. [Wis. Stat.](#) §§ 180.0828, 180.0851, 180.0859.
 - a. A director is not personally liable, and corporation must indemnify director for liabilities arising from breach of duty, *unless* breach constitutes
 - (1) Unfair dealing with corporation or shareholder because of conflict of interest,
 - (2) Violation of criminal law (unless director reasonably believed conduct was lawful),
 - (3) Transaction from which director derived improper personal profit, or
 - (4) Willful misconduct.
 - b. Corporation may limit the application of these sections through provision in articles. [Wis. Stat.](#) §§ 180.0828(2), 180.0852.
 - c. Within limits, corporation may extend indemnity provisions. [Wis. Stat.](#) § 180.0858.
 - d. Various ways by which right to indemnification determined, all of which are beyond the scope of this chapter. [Wis. Stat.](#) § 180.0855.
 - e. Indemnification and allowance of expenses of employees and agents is required in certain instances and may be extended to the extent provided in articles or bylaws. [Wis. Stat.](#) § 180.0856.
 - f. Corporation may maintain insurance for claims against any employee, agent, director, or officer arising from their status as such. [Wis. Stat.](#) § 180.0857.

D. Subchapter S [§ 8.338]

1. In general
 - a. S corporation is corporation that for tax purposes is eligible to elect and properly elects to be taxed in generally the same manner as proprietorship or partnership. I.R.C. § 1361.
 - b. Generally pays no taxes except that an S corporation that used to be a C corporation or that acquired the business of a C corporation in an I.R.C. § 368 reorganization may have to pay taxes on certain income, gains, and passive investment income. I.R.C. § 1374; I.R.C. § 1375.
 - c. Income and loss flow through and are taxed to or deducted by shareholders in pro rata manner (depending on their proportionate stock ownership each day of year). I.R.C. § 1366.

- d. Each item of income or loss retains its character (for example, corporate capital gain taxed as shareholder's capital gain). I.R.C. § 1366; [Wis. Stat.](#) § 71.36(1m).
- e. Shareholder cannot deduct share of S corporation's losses except to the extent of shareholder's tax basis in stock at the end of each year; losses in excess of basis generally may be carried forward to later years; passive loss and at-risk rules may limit ability of shareholders to deduct losses on their personal returns. I.R.C. § 469; I.R.C. § 465; I.R.C. § 1366(d).
- f. For *excess business losses*, I.R.C. § 461(l)(3)(A), incurred in tax years beginning after December 31, 2017, and before January 1, 2027, the amount of loss that can be deducted by a noncorporate partner or S corporation shareholder is limited to \$250,000 per year (\$500,000 in the case of a joint return), with the excess carried forward and treated as a net operating loss. I.R.C. § 461(l); I.R.C. § 172.

NOTE: The CARES Act, Pub. L. No. 116-136, 134 Stat. 281, retroactively delayed the effective date of this provision until taxable years beginning after December 31, 2020.

- g. Corporation that has not so elected is C corporation.
 - h. Because of availability of LLP and LLC forms and because of greater flexibility of these alternatives, use of S corporation is now less desirable.
2. Qualifications. I.R.C. § 1361(b).
- a. Must be U.S. corporation that is not an *ineligible corporation*. I.R.C. § 1361(b)(2).
 - b. No more than 100 shareholders (certain family members are together considered one shareholder for this purpose). I.R.C. § 1361.
 - c. Shareholders must be individuals (other than nonresident aliens), estates, or certain types of trusts or tax-exempt organizations. I.R.C. § 1361(b), (c).

NOTE: If an otherwise qualifying individual shareholder is married to a nonresident alien who has a current ownership interest in the stock, such as a community property interest under U.S., state, or foreign (non-U.S. law), the nonresident alien will be considered a shareholder and the corporation cannot qualify as an S corporation. *Ward v. United States*, 661 F.2d 226 (Ct. Cl. 1981); Treas. Reg. § 1.1361-1(e)(2). If a corporation's S election is inadvertently terminated as a result of a nonresident alien spouse being considered a shareholder, the corporation may request relief under, and subject to the conditions and limitations of, I.R.C. § 1362(f). Treas. Reg. § 1.1361-1(e)(2).

- d. S corporation can have corporate subsidiaries, either C corporations or (as long as 100% owned and special election is made) qualified subchapter S subsidiary corporations. Qualified subchapter S subsidiary election is filed on IRS Form 8869 and, once effective, results in the subsidiary being disregarded as a separate entity for income tax purposes. I.R.C. § 1361(b).
- e. Must not include a nonresident alien as shareholder.
- f. May include only one class of stock.

- (1) Stock with differing voting rights is permitted. I.R.C. § 1361(c)(4).
 - (2) Debt issued by corporation sometimes treated as a second class of stock; may violate one-class-of-stock requirement. I.R.C. § 1361(c)(5).
 - (3) Certain other types of instruments (such as stock options) may, under certain circumstances, constitute an impermissible second class of stock. Treas. Reg. § 1.1361-1(l).
- g. Restrictions that formerly applied to amounts of *passive income* that S corporation could earn (e.g., interest and dividends) no longer apply unless corporation was previously a C corporation or acquired the business of a C corporation in an I.R.C. § 368 reorganization, and has retained C corporation earnings and profits, as determined for income tax purposes. I.R.C. § 1375.
- h. S corporation for federal purposes automatically qualifies as such for Wisconsin tax purposes unless the majority of shareholders elect not to be S corporation for Wisconsin purposes (election cannot be revoked for next five years). [Wis. Stat.](#) §§ 71.34(2), 71.365(4).
3. Election. I.R.C. § 1362.
- a. Corporation may be taxed as S corporation any year if corporation
- (1) Has filed election with IRS in the preceding year, or
 - (2) Files election no later than the 15th day of the third month of the current year.
- NOTE: The election is retroactively valid to the first of the year if all eligibility requirements have been met since the first of the year.
- b. For new corporations, year begins on earliest of the following:
- (1) Date corporation does business,
 - (2) Date corporation obtains assets, or
 - (3) Date corporation has shareholders.
- c. Election is filed on IRS Form 2553, which must be signed by corporate officer and mailed to appropriate service center or faxed (check form instructions).
- d. Each shareholder at election (or, for retroactive election, all shareholders at any time since first of the year) must consent in writing. Treas. Reg. § 1.1362-6(b).
- (1) Consent on separate form or on corporate election form. IRS Form 2553.
 - (2) Consent must be filed with election; relief provisions exist for certain late filings. I.R.C. § 1362(b)(5)(A), (B); Rev. Proc. 2013-30, 2013-36 I.R.B.

- (3) If stock or income from stock is marital property under Wisconsin or other state's law, both spouses must consent even if stock is titled in only one name. Treas. Reg. § 1.1362-6(b)(2)(i).
- e. No separate election required for Wisconsin tax purposes, but shareholders of federal S corporation may elect (in specified manner) not to be S corporation for Wisconsin purposes. [Wis. Stat.](#) §§ 71.34(2), 71.365. In addition, for taxable years beginning in 2018, a corporation that is otherwise an S corporation for Wisconsin income tax purposes may elect, on a year-by-year basis, to be taxed at the entity level, rather than have the entity's income, losses, and deductions flow through to the owners. [Wis. Stat.](#) § 71.365(4m).
- f. Once made, election continues for subsequent years, until
 - (1) Corporation is no longer eligible, *see supra* para. 2.; election terminates on first date eligibility requirements not met; or
 - (2) Majority of shareholders agree to revoke. I.R.C. § 1362(d).
4. Taxable year. I.R.C. § 1378.
 - a. New corporation electing S status generally must adopt the calendar year for tax purposes, and existing S corporations generally must change to that year.
 - b. Exceptions upon application to IRS if corporation shows a sufficient business purpose for different fiscal year and in certain other limited circumstances.

E. Other Tax Considerations [§ 8.339]

1. Structuring corporate capital
 - a. Pursuant to I.R.C. § 1244
 - (1) If corporate stock becomes worthless or shareholder sells or liquidates stock at a loss, this is generally considered a capital loss and is only partially deductible.
 - (2) If corporate stock is I.R.C. § 1244 stock and becomes worthless or shareholder sells or liquidates stock at loss, this is considered an ordinary loss and is fully deductible up to the annual limit (\$50,000 for individual, \$100,000 for spouses filing joint return).
 - (3) Corporate stock qualifies as I.R.C. § 1244 stock if all the following are true:
 - (a) At issuance, issuer is *small business corporation* (generally, corporation with capital not exceeding \$1 million).
 - (b) Issued for money or property other than stock or securities—stock issued for services does not qualify.

- (c) In five most recent taxable years ending before date of loss, more than 50% of gross receipts were from active rather than passive sources.
- (d) Held by person who acquired it from corporation—stock acquired from shareholder is not eligible.

NOTE: There are no particular filing formalities for qualification.

b. Debt versus equity

- (1) Tax advantages in capitalizing corporation with debt (i.e., loans from investors) rather than stock, including the following:
 - (a) Corporation generally can deduct interest paid on debt (dividends paid on stock generally are not deductible).
 - (b) Debt holder generally can receive repayment of principal without tax consequences.
 - (c) Usually most significant for C corporations.

NOTE: Conventional wisdom used to advise that some of an owner's investment take the form of debt, because interest payments were deductible by the corporation, with the interest being taxable as ordinary income at the owner's tax rate. Distributions in the form of dividends on equity, by contrast, resulted in double tax. As a consequence of federal income tax changes generally effective in 2018, however, corporate income paid as dividends is now taxable for federal income tax purposes at a combined corporate and individual marginal tax rate of 39.8%. By contrast, interest payments on debt, even if deductible, are taxable to the holder at 40.8% (assuming an individual in the highest marginal tax bracket, 37%, plus the 3.8% tax under I.R.C. § 1411). In this circumstance, the tax advantage of debt potentially has been eliminated.

- (2) IRS may try to recategorize debt as stock (to deny deduction on interest); take care to structure debt in bona fide manner.
 - (a) Reasonable debt-to-equity ratio (four-to-one is sometimes cited as outer limit of reasonable)
 - (b) Nonproportionate holdings (i.e., preferable if debt and stock not held proportionately)
 - (c) Prompt payment of interest and principal when due
 - (d) Careful attention to formalities

2. Transferring cash or property to corporation. I.R.C. § 351; I.R.C. § 358.

a. Cash

- (1) No immediate tax consequences for shareholders (assuming cash transferred is equal to value of stock received for the cash).
 - (2) Each shareholder contributing cash receives initial tax basis in own stock equal to amount contributed.
- b. Property
- (1) For the transfer to be tax-free to transferor, contribution must meet requirements of I.R.C. § 351.
 - (a) Most significant requirement is that immediately after transfer, all transferors of money or other property must control corporation. *Control* is defined as ownership of at least 80% of stock. I.R.C. § 351(a); I.R.C. § 368(c).
 - (b) However, transfers of property for *nonqualified preferred stock* cannot qualify for section 351 treatment for transferor. I.R.C. § 351(g).
 - (c) If transfer is tax-free, corporation has initial tax basis in contributed property equal to basis property had in hands of contributing shareholder; however, special rules may apply to certain contributed “loss” property that make the tax basis equal to the *lower* fair market value amount. I.R.C. § 362(e).
 - (d) If parties want corporation to have new basis in contributed property, shareholder may sell property to corporation.

NOTE: Gain may be all or part ordinary income because of related party rules and depreciation recapture rules. Loss may be limited or disallowed by I.R.C. § 267. I.R.C. § 1239; I.R.C. § 1245; I.R.C. § 1250.
 - (2) Transferor may receive money and property in addition to stock (as long as 80% control requirement fulfilled) but gain is recognized to extent of such *boot* (any consideration—typically cash—received in addition to qualifying buyer stock).
 - (3) Under I.R.C. § 357, if corporation assumes liabilities of transferor, gain results to transferor if
 - (a) Liabilities exceed tax basis of transferred properties (although not all types of liabilities included in computation), or
 - (b) Purpose is to avoid federal taxation.
3. Contributing services to corporation—if stock is issued in return for services
- a. Not covered by I.R.C. § 351.
 - b. Results in ordinary income for stock recipient (equal to fair market value of stock, minus the amount paid for stock). I.R.C. § 62; I.R.C. § 83.

- c. May result in deduction to corporation, depending on the nature of services and other factors.
- d. Timing of any income or deduction depends on arrangement (e.g., if shareholder receives stock outright on date of organization, income arises then; may be delayed if certain restrictions on stock; even if stock is subject to restrictions that generally delay time of taxation, shareholder may be able to accelerate income event to year of issuance pursuant to election under I.R.C. § 83(b), and this may be desirable under certain circumstances). I.R.C. § 83.
- e. May result in other shareholders being unable to meet 80% requirements of I.R.C. § 351 if shareholders receiving stock for services end up with more than 20% of shares. *See* I.R.C. § 351(a); I.R.C. § 368(c).

V. ORGANIZING A LIMITED LIABILITY COMPANY [§ 8.340]

NOTE. [Wis. Stat.](#) ch. 183 was repealed and recreated by 2021 Wis. Act 258. All references in sections 8.19–.24 to statutes in [Wis. Stat.](#) ch. 183 are to the chapter text before it was repealed and recreated.

A. Preliminary Nontax Considerations [§ 8.341]

1. When to use LLCs—because of significant advantages of the LLC form, LLC should at least be considered for all business organizations; following are principal situations in which LLC would likely *not* be used:
 - a. Now that LLP form is also available, parties preferring flexibility of partnership-type form rather than corporate-type form may prefer LLP form instead (although, as discussed previously, this may not be true for organizations planning to conduct activities in states with no LLP law or less protective LLP law).
 - b. Because principal nontax benefit of LLC is limited liability afforded to all members and because principal tax benefit is its ability to be taxed in same manner as partnership, LLC is not needed if either of these attributes is unimportant or undesirable.
 - c. Single-member LLCs are now recognized in all states. [Wis. Stat.](#) § 183.0201 (2019–20).
2. Preorganization agreement—as with corporations, it may be desirable to have a preorganization agreement, setting forth terms on which LLC members have agreed to proceed.
3. State of organization—as with corporations, for new small businesses with all or most operations to be conducted in Wisconsin, there is no particular advantage in organizing under LLC laws of another state.
4. Name
 - a. Check availability of chosen name before filing articles of organization and before arranging for signs, letterhead, advertising, etc.
 - b. May be desirable to check DFI, telephone and business directories, and trademark lists.

- c. Name must contain the words *limited liability company* or *limited liability co.* or end with the abbreviation *L.L.C.* or *LLC*. [Wis. Stat.](#) § 183.0103(1).
 - d. Name must generally be distinguishable from that of other Wisconsin LLCs, corporations, limited partnerships, cooperatives, or licensed foreign entities; indistinguishable name may be used, however, under some circumstances. [Wis. Stat.](#) § 183.0103(2), (4).
 - e. DFI will provide availability of name by telephone, by mail, or on the internet at <http://www.wdfi.org/corporations/faqs.htm#nameAvailability> (last visited May 18, 2022), and will reserve available name for 120 days upon payment of \$15 fee (written reservation). [Wis. Stat.](#) §§ 183.0104, 183.0114.
5. Determine whether LLC will be run by all members or by managers.
 - a. LLC law permits either structure, but choice must be set forth in articles of organization. [Wis. Stat.](#) § 183.0202.
 - b. If many members, management by members may be impractical.
 - c. Managers may but are not required to be members.
 6. Determine whether there will be an operating agreement.
 - a. If no operating agreement, statutory rules of governance apply.
 - b. Operating agreement may override most of these statutory rules.
 - c. Operating agreement, if any, must be in writing signed by all members. [Wis. Stat.](#) § 183.0102(16).

B. Articles of Organization [§ 8.342]

1. First formal step in organizing LLC is to prepare articles of organization. [Wis. Stat.](#) § 183.0201.
2. Prepared and delivered by *organizer*, who may be any person, whether or not he or she is LLC member. [Wis. Stat.](#) §§ 183.0201, 183.0102(17).
3. No particular form is required, but articles must contain certain information and may contain no other information; *see infra* para. 9. [Wis. Stat.](#) § 183.0202.
4. Articles may be filed online at <https://www.wdfi.org/apps/CorpFormation/directions.aspx?type=12> (last visited May 18, 2022), 24 hours per day, 365 days per year, with a fee of \$130 payable with MasterCard, Discover, Visa, or American Express; paper-based articles may be filed by mail or in person at DFI; filing fee for paper-based filings is \$170. [Wis. Stat.](#) §§ 183.0108(1r)(f), 183.0114; <https://www.wdfi.org/corporations/fees/ltid.htm> (last visited May 18, 2022).
5. Recording fee is not required.

6. For online filings, DFI will confirm the effectiveness of the articles via email with an embedded link to view the effective articles.
7. For paper-based articles, DFI will date stamp original and copy; if requested, will also date stamp additional copies and return to deliverer. [Wis. Stat.](#) § 183.0110(1).
8. Unless delayed effective date is specified in articles (not more than 90 days after filing), articles are effective on day received by secretary for filing. [Wis. Stat.](#) § 183.0111.
9. Per [Wis. Stat.](#) § 183.0202, articles of organization must contain all of, and only, the following information:
 - a. Statement that LLC is organized under [Wis. Stat.](#) ch. 183
 - b. LLC name
 - c. Street address of registered office in Wisconsin and name of registered agent; agent may be individual or qualified person with office in Wisconsin. [Wis. Stat.](#) § 183.0105.
 - d. If management of LLC is to be vested in managers, statement to that effect

NOTE: Managers need not be members or individuals. [Wis. Stat.](#) § 183.0401(2)(b).
 - e. Name and address of organizer, per [Wis. Stat.](#) § 180.0102(17)
 - f. If applicable, delayed effective date of articles is permitted under [Wis. Stat.](#) § 183.0111(2)
 - g. Name and address of person drafting document. [Wis. Stat.](#) § 182.01(3).

C. Operating Agreement [§ 8.343]

1. Definition and purpose
 - a. An operating agreement is an agreement in writing, signed by all LLC members, governing the conduct of business and LLC's relationship with its members. [Wis. Stat.](#) § 183.0102(16).
 - b. Operating agreement closest in concept to partnership agreement; it also is like corporate buy-sell agreement and bylaws.
 - c. LLC need not have operating agreement; one purpose is to override statutory rules of operation that apply in absence of contrary rules in operating agreement.
 - d. Operating agreement can have important tax ramifications.
 - e. Copy of operating agreement is to be kept at LLC's principal place of business. [Wis. Stat.](#) § 183.0405.
2. Possible contents

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- a. Limit purposes for which LLC may be operated. [Wis. Stat.](#) § 183.0106.
 - b. Restrict or enlarge the management rights and duties of members (if articles of organization vest management in members) or managers (if management is vested in managers). [Wis. Stat.](#) § 183.0401.
 - (1) If LLC is to be managed by members, operating agreement may restrict or enlarge management rights and duties of any member; this right may be used to make officers of some LLC members, giving them titles and responsibilities beyond those of other members.
 - (2) Similarly, if LLC is to be managed by managers, operating agreement may restrict or enlarge management rights of any manager; this right could be used to make officers of some managers.
 - (3) Varying the relative rights and duties of members and managers by operating agreement does not necessarily affect their rights to bind LLC in actions with third parties because third parties can generally rely on acts taken by any member (if LLC is member-managed) or any manager (if LLC is managed by managers), if act is in the ordinary course of LLC business and third party does not have knowledge of member or manager's lack of authority. [Wis. Stat.](#) § 183.0301.
 - c. If LLC is to be managed by managers, statute provides that managers must be elected by majority vote of members and serve until resignation or removal by majority vote of members; operating agreement may designate number and term of managers and provide for different manner of selection. [Wis. Stat.](#) § 183.0401.
 - d. Within limits, operating agreement may vary statutory rules on providing indemnification of members and managers involved in proceedings concerning LLC. [Wis. Stat.](#) § 183.0403.
 - e. Statute generally provides for majority voting of members, with each member voting in proportion to value of his or her contribution to LLC; any of this may be varied by operating agreement. [Wis. Stat.](#) § 183.0404.
 - f. Statute lists various matters (such as admitting new members) that require consent of *all* members; this list may be varied by operating agreement. [Wis. Stat.](#) § 183.0404(2).
 - g. Statute generally provides for majority voting of managers, if any, in absence of contrary provision in operating agreement. [Wis. Stat.](#) § 183.0401.

NOTE: The statute does not contain any provisions for meetings of members or managers; an operating agreement may provide such details, as in corporate bylaws, covering matters such as times of meetings, procedures for calling, notices, procedures, quorum rules, etc.
 - h. Operating agreement may provide for manner in which member contributions are valued and procedures for enforcing unpaid contributions; if no such provisions, valuation made by majority vote, and obligations fully enforceable under all circumstances (including death). [Wis. Stat.](#) § 183.0501.

- i. Unless operating agreement provides to the contrary, all profits and losses are allocated on basis of respective values of member contributions. [Wis. Stat.](#) § 183.0503.

NOTE: One advantage of LLC over S corporation is the LLC's ability (like the partnership's) to allocate profits, losses, and interim cash distributions in a manner different from members' respective capital contributions; special allocations will be respected for tax purposes as long as they have a "substantial economic effect." I.R.C. § 704(b).

- j. Unless operating agreement provides to the contrary, members' rights to *interim distributions* (akin to dividends) depend on majority vote of members (if member-managed) or managers. [Wis. Stat.](#) § 183.0601.
- k. Unless operating agreement provides to the contrary, upon partial redemption of member's interest, member has the right to fair value of the redeemed interest. [Wis. Stat.](#) § 183.0603.
- l. Unless operating agreement provides to the contrary, if member dissociates (i.e., leaves LLC), he or she is entitled to distribution, equal to the fair value of that member's interest, within a reasonable time. [Wis. Stat.](#) § 183.0604.
- m. Unless operating agreement provides otherwise, member with right to distribution cannot demand anything other than cash, and if distribution is in kind, member cannot be required to accept any asset in excess of member's percentage interest in LLC. [Wis. Stat.](#) § 183.0605.
- n. Statute provides that LLC interest is freely assignable by member, but assignee obtains only financial rights of assignor and not voting or management rights (unless all other members agree to make assignee full member); this can be enlarged or restricted by operating agreement. [Wis. Stat.](#) §§ 183.0704, 183.0706.

NOTE: An operating agreement may contain typical buy-sell provisions relating to the disposition of member interests in the event of a desired transfer, death, etc., *see infra* § [8.26](#); *see also infra* § [8.24](#) (tax considerations).

- o. Operating agreement may provide that member's interest in LLC will be evidenced by certificate of LLC interest. [Wis. Stat.](#) § 183.0704(2).
- p. Statute allows any member to withdraw from LLC at will, which dissolves LLC unless all remaining members agree to continue, in which event withdrawing member is entitled to fair market value of member's interest; operating agreement can provide instead that members have no power to withdraw or will be in breach of contract if they do so. [Wis. Stat.](#) §§ 183.0802, 183.0901.
- q. Operating agreement can provide for the removal of members and consequences of removal. [Wis. Stat.](#) § 183.0802(1)(c).
- r. Statute provides that member dissociates (i.e., ceases to be member of LLC) upon certain events (e.g., certain transfers of membership interests, bankruptcy and insolvency proceedings, death, incompetency, liquidations of corporate members, etc.); LLCs organized before October 1, 2002, are dissolved upon an event of dissociation unless all

members agree to continue; ex-member of nondissolved LLC is nevertheless entitled to fair value of member's interest; operating agreement may provide instead that these acts do not cause dissociation or, if they do, that LLC is not dissolved or that ex-member is not entitled to fair value of member's interest. [Wis. Stat.](#) §§ 183.0802(1), 183.0901.

- s. Statute provides that LLC dissolves upon occurrence of events specified in operating agreement, written consent of all members, or (for LLCs organized before October 1, 2002) event of dissociation (as described above), unless all members agree to continue or operating agreement otherwise provides. [Wis. Stat.](#) § 183.0901.
- t. Statute provides details for winding up LLC affairs in the event of dissolution; these may be varied by operating agreement. [Wis. Stat.](#) § 183.0903.
- u. Statute provides details for how LLC assets and liabilities are to be handled upon dissolution; these can be varied by operating agreement. [Wis. Stat.](#) § 183.0905.
- v. If operating agreement allocates profit and loss among members in a manner that differs from their capital accounts, it is a good idea to include in agreement technical tax provisions provided in tax regulations or at least provision incorporating those provisions by reference. *See* Treas. Reg. § 1.704-1(b); Treas. Reg. § 1.704-1T(b).

D. Other Nontax Considerations [§ 8.344]

1. Contributions. [Wis. Stat.](#) § 183.0501.
 - a. Contributions to LLC by member may be in cash, property, services rendered, promissory notes, or other written obligations to provide cash, property, or services.
 - b. Value of contribution determined by operating agreement or majority vote of members.
 - c. If contribution is not fully paid, it is generally enforceable by LLC on occurrence of any event, including death of member. [Wis. Stat.](#) § 183.0502.
2. Shares
 - a. Operating agreement may provide that members' LLC interests may be evidenced by certificates, similar to stock certificates of corporation. [Wis. Stat.](#) § 183.0704.
 - b. Statute provides that all member interests must be treated alike, except for value of contributions by that member; operating agreement may vary this, however, enabling interests to vary in terms of voting, right to distributions, etc., achieving same result as having different classes of stock.
3. Statute provides a list of records and information that must be kept by LLC at its principal place of business; among other items, generally includes value placed on each member's contribution, which governs members' respective voting rights and rights to distributions (in absence of operating agreement to contrary). [Wis. Stat.](#) § 183.0405.
4. Subscription agreement is not required, but may serve the same purpose as corporate subscription agreement described in section [8.16](#), *supra*.

5. Organizational procedures
 - a. Statute provides no particular procedures that need to be followed after articles of organization are filed.
 - b. Following procedures would be appropriate:
 - (1) Organizer can call initial meeting of LLC members (or circulate consent form to be signed by all members).
 - (2) Organizer can also call on initial members to make their contributions.
 - (3) Might be appropriate for organizer to sign form for minutes book, recording the filing of articles of organization and call for initial meeting and contributions.
 - (4) Organizer (or other person who will be member or manager) can prepare proposed operating agreement.
 - (5) Initial members, at initial meeting or by consent, can establish the value of all member contributions, adopt and sign operating agreement (if there is to be one), elect managers, and call for initial meeting of managers (if there are managers and if they are to be elected by members).
 - (6) If there are to be managers, managers can then meet (or sign a consent form) taking other steps necessary for organization, such as listed in section [8.16](#), *supra*, for first meeting of corporate board of directors.
 - (7) Various steps should be taken such as listed in section [8.16](#), *supra*, for organization of corporation, such as ordering and preparing minutes book, preparing certificates of ownership (if any), transferring property to new entity by deed or bill of sale, obtaining miscellaneous licenses, permits, tax registrations, etc., and complying with all necessary state and federal securities law requirements.
6. Federal and state securities law requirements—because organization of an LLC may involve sale of securities to investor, check whether sale is exempt from securities law registration requirements and whether any procedures or filings are necessary to qualify for exemption.

E. Tax Considerations [§ 8.345]

1. Subject to classification issues as discussed in para. 2., *infra*, LLC will be taxed in same manner as partnership; if so,
 - a. No special tax election is necessary.
 - b. LLC is not a taxable entity; all profits and losses flow through to members.
 - c. Losses may be deducted only up to members' bases in their LLC interests; as with partnership (and unlike S corporation), basis will include member's share of LLC

liabilities, with such share most commonly equal to member's share of LLC profits. I.R.C. § 704; I.R.C. § 752.

- d. Loss deductions are also limited by at-risk and passive loss rules. I.R.C. § 465; I.R.C. § 469.
- e. Members' respective shares of LLC profits and losses are determined by operating agreement, as long as allocation has substantial economic effect; need not be based on respective contributions. I.R.C. § 704(b).
- f. For losses incurred in tax years beginning after December 31, 2017, and before January 1, 2027, the amount of loss that can be deducted by a noncorporate member is limited to \$250,000 per year (\$500,000 in the case of a joint return), with the excess carried forward and treated as a net operating loss. I.R.C. § 461(l); I.R.C. § 172.

NOTE: The CARES Act, Pub. L. No. 116-136, 134 Stat. 281, retroactively delayed the effective date of this provision until taxable years beginning after December 31, 2020.

- g. Federal income tax legislation enacted in 2015 but generally effective for tax years beginning after December 31, 2017, significantly changed the procedures relating to audits of partnerships (and entities treated as partnerships) for income tax purposes. These changes provide that the partnership itself may be liable for audit adjustments, although certain actions can be taken so that the partnership adjustments apply at the partner level. Accordingly, operating agreements should address procedures and elections relating to income tax audits of the partnership, including impact on the partnership and partners for the current year and partners (both current and former) during the tax year(s) under audit. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101, 129 Stat. 584.
- h. Generally, there is no gain or loss on contribution of property to LLC; but if property is encumbered by liabilities there may be tax consequences; also, under I.R.C. § 721(c), special rules apply to appreciated property contributed to partnerships that include as partners non-U.S. persons; *see supra* § 8.10, para. 3.d.(4). I.R.C. § 721.
- i. If member receives LLC interest for services, there may be tax consequences, both for that member and for others; *see supra* § 8.10, para. 3.e.

2. Classification issues

Under *check-the-box regulations*, a domestic LLC with two or more members generally will be classified as a partnership, unless it elects to be treated as a corporation; a single-member LLC will be ignored for federal tax purposes (with its income and losses flowing through to its member) unless it elects to be treated as a corporation. Treas. Reg. §§ 301.7701-1 to -3.

VI. BUY-SELL AGREEMENTS [§ 8.346]

A. Nontax Considerations [§ 8.347]

1. Introduction

- a. If there is more than one shareholder in a closely held corporation, consider buy-sell agreement.

- b. Similar provisions may be useful in operating agreement of an LLC.
 - c. In buy-sell agreement, corporation and shareholders specify what will happen to corporate stock upon certain contingencies (such as death of a shareholder).
 - d. Disadvantages of alternatives to buy-sell agreement
 - (1) Provisions can be included in articles of incorporation, but articles are of public record and amendment procedure is cumbersome.
 - (2) Provisions can be included in bylaws, but questions exist concerning whether restrictions may be amended by vote of majority shareholders over objections of minority.
 - e. Buy-sell agreement places restrictions in a separate contract to which corporation and shareholders are parties.
 - f. If appropriate reference to contract made on stock certificates, restrictions are binding on third parties. [Wis. Stat.](#) § 180.0627(3).
2. Usual purposes
- a. To restrict ownership of shares to a known group of persons and to give an existing group the right to decide whether to admit new owners to group.
 - b. To restrict ownership of shares to persons active in business.
 - c. To ensure availability of corporate funds for shareholders or their successors at particular times (e.g., death).
 - d. To attempt to fix the value of corporate stock for estate and inheritance tax purposes.
 - e. To maintain the balance of power among shareholders.
3. Other uses
- a. To enter into understandings regarding operation of corporation and compensation to executives.
 - b. To ensure position on the board of directors for certain shareholders through voting agreements.
 - c. To delineate general voting rights.
4. Planning considerations for stock transfer restrictions
- a. Agreement should list contingencies on which it becomes operable.
 - (1) Usually includes transfers to third parties and death.

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- (2) May include termination of employment and disability (terms should be carefully defined).
 - b. Reasonable restrictions on transfers specifically permitted. [Wis. Stat. § 180.0627](#).
 - c. *First refusal limitations* on transfer of stock are almost universally imposed (i.e., that stock cannot be sold to another party without first being offered back to corporation and remaining shareholders).
 - (1) Parties should decide
 - (a) Whether limitation applies to transfers to persons who are already shareholders
 - (b) Whether limitation applies to gifts or sales to family members
 - (c) Whether limitation applies to transfers by operation of law (e.g., divorce, marital property transfers)
 - (d) Whether limitation applies to pledges of stock
 - (e) Whether offer back price is
 - (i) Fixed or formula (e.g., price that would be paid if transferor died), *or*
 - (ii) Price offered by prospective buyer (agreement should not fix value of stock for estate, inheritance, or gift tax purposes).
 - (2) If more than two shareholders, specify allocation of purchase rights or obligations.
 - d. Insurance often used to fund buyout.
 - (1) Determine insurance costs and availability.
 - (2) If purchase is not paid with insurance, it is often desirable to allow installment payments; consider
 - (a) Term of payment
 - (b) Interest requirements
 - (c) Collateral
 - (d) Guaranties
 - e. In choosing between redemption-type agreement and cross-purchase agreement, parties should consider
 - (1) Tax problems of redemption agreements, *see infra* § [8.27](#).

- (2) Source of buyout funds (if not insurance, redemption agreement usually preferable)
 - (a) Enables funding with corporate earnings
 - (b) Tax advantages
 - (c) Allows corporation to use funds in interim for corporate purposes such as loan collateralization
- (3) Costs of insurance: in cross-purchase funded by insurance, each shareholder must
 - (a) Maintain life insurance policy on the life of every other shareholder.
 - (b) Personally pay premiums.

f. Pricing

- (1) Most common methods of determining purchase price under buy-sell agreement
 - (a) Price offered by bona fide third-party offeror
 - (b) Book value (may be dangerous because in many businesses this has little relation to fair market value); failure to expressly define “book value” in the agreement may lead to disputes. *Ehlinger v. Hauser*, 2010 WI 54, 325 Wis. 2d 287; *Schumann v. Samuels*, 31 Wis. 2d 373 (1966).
 - (c) Outside appraisal at purchase (creates planning uncertainties)
 - (d) Formula (e.g., multiple of earnings for some period before purchase)
 - (e) Agreed value, to be set annually or at specified interval by shareholders (use backup method in case parties forget to make periodic modification or are unable to agree)
 - (f) Combination of approaches in paras. (a)–(e), *supra*
- (2) In determining price in insurance-funded agreement, consider receipt of insurance proceeds (if paid into corporation, effect of its value).

g. Marital property (whether now or potentially in the future)

- (1) Under Wisconsin law, actions of titled shareholder are binding on spouse.
- (2) Agreement should address rights of spouse in the event of death or divorce.

h. If corporation is organized under Wisconsin close corporation law, buy-sell provisions are established by statute, *see supra* § 8.14, para. 4. [Wis. Stat.](#) § 180.1805.

B. Tax Considerations [§ 8.348]

1. Tax considerations below generally do not apply to LLC, assuming LLC is taxed as partnership.
2. Whether seller of stock under agreement will incur capital gain or dividend; this is important because of spread between ordinary income rates and capital gains rates for individuals and also because 100% of dividend is usually taxable, while nondividend is usually taxed only to the extent payment exceeds basis of stock (but see the note immediately below); if a transfer occurs at a loss (i.e., the amount received is less than the holder's basis in the stock transferred) and is not treated as a dividend, recognition of the loss may be disallowed by I.R.C. § 267. In addition, if all or part of the purchase price is a note, the full fair market value of the note generally will be taxed upon receipt if the distribution is a *dividend*, but *installment reporting* under I.R.C. § 453 may be available if the redemption qualifies as a sale or exchange.

NOTE: For certain "qualified" dividends paid by C corporations to individuals after December 31, 2002, and before January 1, 2013, such dividends generally were taxed for federal income tax purposes at the same rate as net long-term capital gains (i.e., for individuals, generally at a maximum of 15%). Effective January 1, 2013, the maximum rate increased from 15% to 20%. I.R.C. § 1(h)(11).

- a. Generally, capital gain in cross-purchase agreement (stock purchased by another shareholder), although purchase of stock by a related corporation (other than the issuer) could result in dividend treatment under I.R.C. § 304.
- b. In redemption agreement, seller has dividend unless requirements of I.R.C. § 302 or I.R.C. § 303 are met.

NOTE: Detailed discussion of I.R.C. § 302 and I.R.C. § 303 is beyond the scope of this chapter.

- (1) Generally, requirements of I.R.C. § 302 are met only if buyout
 - (a) Is "not essentially equivalent to a dividend" (undefined and vague), taking into account stock owned by seller and certain related parties;
 - (b) Is "substantially disproportionate" (as defined), again taking into account stock owned by seller and certain related parties;
 - (c) Completely terminates stock interest of selling shareholder (taking into account stock owned by seller and certain related parties; stock of related parties not considered in some circumstances); or
 - (d) Is a redemption of a noncorporate shareholder's stock in partial liquidation of the corporation.
- (2) Generally, terms of I.R.C. § 303 are met only if
 - (a) Buyout is result of death of shareholder,
 - (b) Stock comprised at least 35% of decedent's estate, and

- (c) Redemption amount does not exceed amount of estate and inheritance taxes and other death costs.
3. If agreement requires seller's stock to be purchased by another shareholder, and at implementation, corporation makes purchase, this may result in dividend to shareholder obligated to make purchase. Rev. Rul. 69-608, 1969-2 C.B. 42.
- NOTE: It is usually best to give the option to other shareholders rather than impose a binding obligation.
4. If buy-sell agreement is funded by insurance, premiums are not deductible.
- a. If cross-purchase agreement and premiums are paid by corporation, premiums are taxed as dividends to shareholders.
 - b. Life insurance proceeds when received by purchaser usually are not taxable income (although when paid by purchaser to seller, taxed as described in this section).
5. If purpose of agreement is to attempt to fix value of stock for estate, gift, or inheritance tax purposes,
- a. Price must be absolutely fixed in amount or by formula.
 - b. Agreement must obligate decedent's estate to sell stock (option to sell insufficient).
 - c. Obligation must have been binding during decedent's life as well.
 - d. Agreement must not be mere tax avoidance device to pass on stock to objects of decedent's bounty at less than adequate consideration.
 - e. Agreement must be a *bona fide business arrangement*, and its terms must be comparable to similar arrangements entered into by persons in arms' length transaction. I.R.C. § 2703.

Chapter 9

Litigation References and Resources

Heidi Acker Yelk

Wisconsin State Law Library
Madison

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50. Nelson, B.P., & I.H. Fisher, eds., *Model Jury Instructions: Business Torts Litigation* (Litig. Section, Am. Bar Ass'n 4th ed. 2005).
51. Office of Jud. Educ., *Wisconsin Judicial Benchbooks* (State Bar of Wis. 5th ed. 2016–17 & Supps., 6th ed. 2018–19 & Supps., 7th ed. 2020–21 & Supps.) (annual supplements, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>). Although the Benchbooks are not intended to be cited as independent legal authority, they do discuss statutory and case law in five volumes: Civil; Criminal and Traffic; Family; Juvenile; and Probate, Guardianship, and Mental Health. Procedure checklists and statutory and case citations included.
52. Posner, R.A., *How Judges Think* (Harvard Univ. Press 2008).
53. Read, D.S., *Winning at Trial* (Nat'l Inst. for Trial Advoc. 2007) (two DVDs).
54. Richmond, D.R. et al., *Professional Responsibility in Litigation* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 3d ed. 2021).
55. Scalia, A., & B.A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West 2008).
56. Simpson, R.W., & M.R. Vasaly, *The Amicus Brief: How to Write It and Use It Effectively* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 3d ed. 2010).
57. Small, D.I., & R.P. West, *Letters for Litigators: Essential Communications for Opposing Counsel, Witnesses, Clients, and Others* (Solo, Small Firm & Gen. Prac. Div., Am. Bar Ass'n 2004) (includes CD-ROM).
58. Stein, J.A. et al., *Closing Arguments: The Art and the Law* (Clark Boardman Callaghan 2021–22) (annual).

59. Tigar, M.E., *Persuasion: The Litigator's Art* (Litig. Section, Am. Bar Ass'n 1999).
60. Warshafsky, T.M., & F.T. Crivello II, *Trial Handbook for Wisconsin Lawyers* (Laws. Coop. Publ'g 3d ed. 2005) (two volumes, annual pocket parts, component of *Wisconsin Practice Series*, vols. 10 & 11). Discusses all aspects of trial, motions, evidence, postverdict proceedings, and judgments.
61. Watts, M.C. & S.A. McEntire, *Trial: A Guide from Start to Finish: Perspectives from Opposing Counsel* (Solo, Small Firm & Gen. Prac. Div., Am. Bar Ass'n 2020).
62. Weismann, M.F., *Parallel Proceedings: Navigating Multiple Case Litigation* (Litig. Section, Am. Bar Ass'n 2011).
63. *Wisconsin Civil Litigation Codebook* (State Bar of Wis. 2021); also, *Wisconsin Rules of Evidence: 2021 Pocket Edition* (State Bar of Wis. 2021).
64. *Wisconsin Court Rules and Procedure – Federal, State, Local* (Thomson West 2022) (annual, three volumes). Includes state and federal rules of civil procedure, rules of evidence, rules of criminal procedure, and Wisconsin Supreme Court Rules.
65. Wisconsin Jud. Conf., *Wisconsin Jury Instructions—Civil* (available online at <https://wilawlibrary.gov/jury/>)
66. *Wisconsin Practice Series* (Thomson West) (22 volumes, annual pocket parts). Includes discovery, procedure, rules handbook, criminal practice, methods of procedure.

II. GENERAL PUBLICATIONS—Damages [§ 9.350]

1. Anderson, R.R., *Damages Under the Uniform Commercial Code* (Clark Boardman Callaghan 2021–22) (annual, two volumes).
2. Baker, W.G., & M.K. Seck, *Determining Economic Loss in Injury and Death Cases* (Clark Boardman Callaghan 2d ed. 1993) (annual supplement).
3. Bayer, N.J. et al., *Damages: Current Trends and Strategies* (Nat'l Bus. Inst. 2009) (seminar material).
4. Boston, G.W. et al., *Emotional Injuries: Law and Practice* (Clark Boardman Callaghan 1998) (loose-leaf, annual update).
5. Dunn, R.L., *Recovery of Damages for Fraud* (Lawpress Corp. 3d ed. 2004 & Supp. 2020).
6. Dunn, R.L., *Recovery of Damages for Lost Profits* (Lawpress Corp. 6th ed. 2005 & Supp. 2021).
7. Eades, R.W., *Jury Instructions on Damages in Tort Actions* (LexisNexis 5th ed. 2003 & Supp. 2020).

8. Gasiorkiewicz, E.A. et al., *Proving and Disputing Damages* (Nat'l Bus. Inst. 2007) (seminar material).
9. Kircher, J.J., & C.M. Wiseman, *Punitive Damages: Law and Practice* (Clark Boardman Callaghan 2d ed. 2021) (two volumes, annual).
10. McCarthy, J.C., *Recovery of Damages for Bad Faith* (Lawpress Corp. 5th ed. 1990 & Supp. 2021) (two volumes).
11. Schlueter, L.L., *Punitive Damages* (Matthew Bender 8th ed. 2020) (two volumes, annual supplement).
12. Stephenson, S.P., & D.A. Macpherson, *Determining Economic Damages* (James Publ'g 2021) (annual).
13. Ware, R.M., ed., *The Law of Damages in Wisconsin* (State Bar of Wis. 8th ed. 2020 & Supp.) (three-volume set, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>).
14. Zalma, B., *Diminution in Value Damages: How to Determine the Proper Measure of Damage to Real and Personal Property* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 2015).

III. GENERAL PUBLICATIONS—Discovery [§ 9.351]

1. Arkfeld, M.R., *Arkfeld's Best Practices Guide for Electronic Discovery and Evidence* (Law Partner Publ'g 2021–22) (annual).
2. Arkfeld, M.R., *Arkfeld's Best Practices Guide for ESI Pretrial Discovery: Strategy and Tactics* (Law Partner Publ'g 2021–22) (annual).
3. Arkfeld, M.R., *Arkfeld's Best Practices Guide: Information Technology Primer for Legal Professionals* (Law Partner Publ'g 2021–22) (annual).
4. Bayer, N.J. et al., *Advanced Discovery and Evidence* (Nat'l Bus. Inst. 2011) (seminar material).
5. Bayer, N.J. et al., *Practical Discovery from A to Z* (Nat'l Bus. Inst. 2010) (seminar material).
6. Bialzik, M.A. et al., *Wisconsin Discovery Law and Practice* (State Bar of Wis. 5th ed. 2017 & Supp.) (available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Books>).
7. Edwards, T.D. et al., *Electronic Litigation* (Nat'l Bus. Inst. 2013) (seminar material).
8. Feedham, J.M. et al., *Everything You Don't Know About E-Discovery (But Wish You Did)* (Nat'l Bus. Inst. 2012) (seminar material).
9. Foster, R.J., & W.A. Masters, *Civil Court Judicial Forum: Advanced Discovery and Trial Practice* (Nat'l Bus. Inst. 2018) (seminar material).

10. Grenig, J.E., & W.C. Gleisner, *eDiscovery and Digital Evidence* (Thomson West 2019–20) (annual).
11. Grimm, P.W. et al., *Discovery Problems and Their Solutions* (Am. Bar Ass'n 4th ed. 2020).
12. Haydock, R.S., & D.F. Herr, *Discovery Practice* (Wolters Kluwer 8th ed. 2021–22) (annual).
13. Lipson, A., *Guerrilla Discovery* (James Publ'g 2021) (annual).
14. McEntire, S.A., *Mastering the Art of Depositions* (Solo, Small Firm & Gen. Prac. Div., Am. Bar Ass'n 2016).
15. Nelson, S.D. et al., *The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines* (Law Prac. Mgmt. Section, Am. Bar Ass'n 2006) (includes CD-ROM).
16. *Pattern Discovery* series (Clark Boardman Callaghan) (loose-leaf, annual supplements). A series providing pattern discovery and pattern interrogatories. Titles include: Employment and Labor Law, Employment Discrimination, Medical Malpractice, Motor Vehicles, Tort Actions, Premises Liability, and Products Liability.
17. Paul, G.L., & B.H. Nearon, *The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure* (Am. Bar Ass'n 2006).
18. Scheindlin, S.A., *Electronic Discovery and Digital Evidence in a Nutshell* (West Acad. Publ'g 2d ed. 2016).
19. Taladay, J., & E. Koons, eds., *Obtaining Discovery Abroad* (Antitrust Section, Am. Bar Ass'n 3d ed. 2020).
20. Wochna, D.A., *Making E-Discovery Affordable* (Nat'l Bus. Inst. 2009) (seminar material).

IV. GENERAL PUBLICATIONS—Evidence [§ 9.352]

1. Baish, A.S. et al., *Evidence and Expert Testimony Best Practices: Supporting Your Case* (Nat'l Bus. Inst. 2007) (seminar material).
2. Best, A., *Wigmore on Evidence 4th* (Wolters Kluwer 1995) (13 volumes, annual supplement).
3. Briones, J., & A. Tagvoryan, *Social Media as Evidence: Cases, Practice Pointers, and Techniques* (Law Prac. Mgmt. Section, Am. Bar Ass'n 2013).
4. Brose, M. et al., *The Wisconsin Rules of Evidence: A Courtroom Handbook* (State Bar of Wis. 10th ed. 2020 & Supp.) (available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Books>). A trial handbook, providing easy reference to Wisconsin Rules of Evidence and significant case annotations.
5. Federal Jud. Ctr. et al., *Reference Manual on Scientific Evidence* (Nat'l Acads. Press 3d ed. 2011).
6. Fine, R.A., *Fine's Wisconsin Evidence* (Juris Publ'g 2d ed. 2008) (annual supplement).

7. Giannelli, P.C. et al., *Scientific Evidence* (Matthew Bender 6th ed. 2020) (three volumes) (periodic supplements).
8. Imwinkelried, E.J., *Evidentiary Foundations* (Matthew Bender 11th ed. 2020).
9. Imwinkelried, E.J., *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges* (Wolters Kluwer 3d ed. 2017) (annual supplement) (two volumes).
10. Kaye, D.H. et al., *The New Wigmore: A Treatise on Evidence: Expert Evidence* (Wolters Kluwer 3d ed. 2021) (annual supplement).
11. Koesel, M.M., & T.L. Turnbull, *Spoilation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 3d ed. 2013).
12. Kramer, C.W. et al., *Evidence: Strategies for Finding, Preserving, & Using Evidence to Support Your Case* (Nat'l Bus. Inst. 2008) (seminar material).
13. Lawson, G., *Evidence of the Law: Proving Legal Claims* (Univ. of Chi. Press 2017).
14. Mosteller, R.P., ed., *McCormick on Evidence* (Thomson Reuters 8th ed. 2020) (two volumes).
15. O'Neal, S.V., & A.R. Gruber, *Engineering Evidence* (Clark Boardman Callaghan 4th ed. 2005) (three volumes, loose-leaf, annual supplement). Guides to presenting engineering evidence and exhibits. Also includes techniques for locating, selecting, and presenting an expert witness.
16. Rice, P.R., *Electronic Evidence: Law and Practice* (Litig. Section, Am. Bar Ass'n 2d ed. 2008).
17. Rothstein, P.F. et al., *Evidence in a Nutshell* (West Acad. Publ'g 6th ed. 2012).

V. GENERAL PUBLICATIONS—Witnesses [§ 9.353]

1. Cabaniss, J.C. et al., *The Art of Depositions: Powerful Techniques to Maximize Your Success* (Nat'l Bus. Inst. 2009) (seminar material).
2. Danner, D., & L.L. Varn, *Expert Witness Checklists* (Laws. Coop Publ'g 3d ed. 1999) (three volumes, annual supplement, includes CD-ROM).
3. Easton, S.D., *Opposing the Adverse Expert: A Comprehensive Guide for Every Stage of Litigation* (Litig. Section, Am. Bar Ass'n 2d ed. 2018).
4. Faust, D., *Coping with Psychiatric and Psychological Testimony* (Oxford Univ. Press 6th ed. 2011).
5. Galluzzo, D.J., *Qualifying & Attacking Expert Witnesses* (James Publ'g 2021).
6. Gibbons, C.B., ed., *The Art of Cross Examination: Essays from the Bench and Bar* (Litig. Section, Am. Bar Ass'n 2014).

7. Hecht, H.L., *Effective Depositions* (Litig. Section, Am. Bar Ass'n 2d ed. 2010).
8. Israel, S.M., *Taking and Defending Depositions* (Am. L. Inst. Continuing Legal Educ. 2d ed. 2017).
9. Kestler, J.L., *Questioning Techniques & Tactics* (Clark Boardman Callaghan 3d ed. 1999) (loose-leaf, annual supplement).
10. Korris, N.B., *Can You Spot People When They're Lying?: Investigating Tools and Interviewing Techniques for Legal Professionals* (State Bar of Wis. 2007) (seminar materials).
11. Kuhne, C.C., III, *A Litigator's Guide to Expert Witnesses* (Solo, Small Firm & Gen. Prac. Div., Am. Bar Ass'n 2d ed. 2019).
12. Miller, J.M., ed., *From the Trenches II: Mastering the Art of Preparing Witnesses* (Solo, Small Firm & Gen. Prac. Div., Am. Bar Ass'n 2017).
13. Pozner, L.S., & R.J. Dodd, *Advanced Cross-Examination Techniques* (LexisNexis 3d ed. 2016) (4 DVDs).
14. Pozner, L.S., & R.J. Dodd, *Cross-Examination: Science and Techniques* (LexisNexis 3d ed. 2018).
15. *Preparing for Your Deposition* (State Bar of Wis. L. Office Video 2008) (available as on-demand seminar, <https://marketplace.wisbar.org/CLE-Seminars>).
16. *Preparing for Your Deposition: Spanish Version (Preparando Su Declaración)* (State Bar of Wis. L. Off. Video 2008) (available as on-demand seminar, <https://marketplace.wisbar.org/CLE-Seminars>).
17. *Preparing Witnesses* (Litig. Section & Ctr. for Continuing Legal Educ., Am. Bar Ass'n 2003) (DVD).
18. Ranney, J.A., *Deposition Objections* (James Publ'g 2017) (includes CD-ROM).
19. Rosner, J.L., *Preparing Witnesses* (Clark Boardman Callaghan 3d ed. 2006 & Supp. 2021) (loose-leaf).
20. Sandler, P.M., & J.K. Archibald, *Model Witness Examinations* (Litig. Section, Am. Bar Ass'n 4th ed. 2016).
21. Schaeffer, T.E., *Deposition Checklists and Strategies* (James Publ'g 2006) (loose-leaf, annual update, includes CD-ROM).
22. Small, D.I., *Preparing Witnesses: A Practical Guide for Lawyers and Their Clients* (Am. Bar Ass'n 5th ed. 2020).
23. Suplee, D.R. et al., *The Deposition Handbook* (Wolters Kluwer 5th ed. 2011) (annual supplement).

24. Tigar, M.E., *Examining Witnesses* (Litig. Section, Am. Bar Ass'n 2d ed. 2003).
25. Walker, A.G., & J. Kenniston, *Handbook on Questioning Children: A Linguistic Perspective* (Ctr. on Child. & the L., Am. Bar Ass'n 3d ed. 2013).
26. *Witness Preparation and Presentation: The Overlooked Skill of Direct Examination* (Litig. Section & Ctr. for Continuing Legal Educ., Am. Bar Ass'n 2005) (sound recording, one sound disc with study guide).

VI. PERSONAL INJURY [§ 9.354]

1. Bankston, R.G., & J.A. Tarantino, *Personal Injury Forms: Discovery & Settlement* (James Publ'g Softcover ed. 2011).
2. Bax, J.C. et al., *Anatomy and Physiology 101 for Attorneys* (Nat'l Bus. Inst. 2014) (seminar material).
3. Booth, L., & R. Booth, *Personal Injury Handbook* (James Publ'g 2011 & Supp. 2013) (loose-leaf, includes CD-ROM).
4. Caya, S.T. et al., *Plaintiff's Personal Injury from Start to Finish* (Nat'l Bus. Inst. 2012) (seminar material).
5. Centofanti, K.L. et al., *Damages in Personal Injury* (Nat'l Bus. Inst. 2013) (seminar material).
6. Centofanti, K.L. et al., *Handling a Personal Injury Case from Start to Finish* (State Bar of Wis. 2019) (available as on-demand seminar, <https://marketplace.wisbar.org/CLE-Seminars>).
7. Coben, L.E., *Crashworthiness Litigation* (Clark Boardman Callaghan 2d ed. 2008) (loose-leaf, annual supplement).
8. *Personal Injury Law Library with Interrogatories* (Matthew Bender/LexisNexis). A CD-ROM collection from LexisNexis that includes a variety of personal injury texts covering discovery, torts, medical malpractice, premises liability, and drunk driving.
9. *Personal Injury Valuation Handbooks* (Thomson Reuters) (nine volumes, loose-leaf, updates as necessary).
10. Swarbrick, E., *What's It Worth? A Guide to Current Personal Injury Award Settlements* (Matthew Bender) (annual).
11. Swartz, E.M., & E.D. Swartz, *Handbook of Personal Injury Forms and Litigation Materials* (Clark Boardman Callaghan 2d ed. 1995) (two volumes, loose-leaf, annual supplement).

VII. PERSONAL INJURY—Wisconsin-Specific [§ 9.355]

1. *Wisconsin Law Journal Verdicts and Settlements* research database. Search Wisconsin verdicts and settlements by keyword description and date, court, value, case number, or party name. Anyone may submit a verdict or settlement for publication; confidential or undisclosed

settlements are not published. Access is included with a subscription to *Wisconsin Law Journal*, <https://verdicts.wislawjournal.com>.

2. The State Bar of Wisconsin has entered into an alliance agreement with West, a Thomson Reuters business, to provide to State Bar members award information on Wisconsin civil jury trials, bench trials, settlements, and arbitrations. West's editorial staff selects a few key Wisconsin cases from Westlaw's® *West's Jury Verdicts – Wisconsin Reports* to highlight in each issue of *WisBar InsideTrack*.

VIII. PRODUCTS LIABILITY [§ 9.356]

1. *American Law of Products Liability* (Clark Boardman Callaghan 3d ed. 1997) (multivolume set, quarterly supplements).
2. Baldwin, S. et al., *The Preparation of a Product Liability Case* (Wolters Kluwer 3d ed. 1998) (loose-leaf, periodic supplements).
3. Bass, L., & T. Redick, *Products Liability: Design and Manufacturing Defects* (Clark Boardman Callaghan 2d ed. 2021–22) (annual).
4. Owen, D.G. et al., *Owen and Davis on Products Liability* (Thomson West 4th ed. 2014) (four volumes, annual pocket parts).
5. Owen, D.G., *Products Liability in a Nutshell* (West Acad. Publ'g 9th ed. 2015).
6. Restatement of the Law, 3d Torts: Products Liability (Am. L. Inst. 1998).
7. Schaefer, T. et al., eds., *Model Jury Instructions: Product Liability* (Am. Bar Ass'n 2017).
8. Scharf, S.A. et al., eds., *Product Liability Litigation: Current Law, Strategies and Best Practices* (Practising L. Inst. 2d ed. 2021) (two volumes).

IX. AUTOMOBILE [§ 9.357]

1. Blashfield, D.C. et al., *Blashfield Automobile Law and Practice* (Thomson West 4th ed. 2008) (16 volumes, annual pocket parts).
2. Goodman, R.M., & Center for Auto Safety, *Automobile Design Liability* (Clark Boardman Callaghan 3d ed. 1992) (four volumes, loose-leaf, periodic updates).
3. Robins, P.J., *Eyewitness Reliability in Motor Vehicle Crashes: A Primer for Practitioners* (Laws. & Judges Publ'g Co. 2d ed. 2009).
4. Ruhl, L.L., & M.K. Dooley-Owen, eds., *Truck Accident Litigation* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 3d ed. 2012).

X. AUTOMOBILE—Wisconsin-Specific [§ 9.358]

1. Caya, S.T. et al., *Auto Injury Litigation from Start to Finish* (Nat'l Bus. Inst. 2017) (seminar material).

2. Centofanti, K.L., & R.G. Pezze, *Handling the Auto Injury Claim* (Nat'l Bus. Inst. 2008) (seminar material).
3. Ford, M.M. et al., *Litigating the Uninsured & Underinsured Motorist Claim* (Nat'l Bus. Inst. 2010) (seminar material).

XI. PREMISES AND SAFE PLACE [§ 9.359]

1. Kaminsky, A., *A Complete Guide to Premises Security Litigation* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 3d ed. 2007).
2. Turnbow, C.E., *Slip and Fall Practice* (James Publ'g 2d ed. 1994) (loose-leaf, annual supplement, includes CD-ROM of forms and letters).
3. Weissenberger, G., & B.B. McFarland, *The Law of Premises Liability* (LexisNexis 4th ed. 2011) (periodic supplements).

XII. PREMISES AND SAFE PLACE—Wisconsin-Specific [§ 9.360]

1. Berndt, A.R. et al., *Premises Liability in Wisconsin* (Lorman Educ. Servs. 2014) (seminar material).

XIII. WRONGFUL DEATH [§ 9.361]

1. End, J.M., & M.E. Larson, *Trying the Wrongful Death Case in Wisconsin: Strategies in Preparation and Valuation* (Nat'l Bus. Inst. 2005) (seminar material).
2. Rooks, J.E., *Recovery for Wrongful Death* (Clark Boardman Callaghan 5th ed. 2021) (three volumes, loose-leaf, annual supplement).
3. Speiser, S.M., & J. Maher, *Recovery for Wrongful Death and Injury Economic Handbook* (Clark Boardman Callaghan 4th ed. 1995) (annual supplement, includes CD-ROM).

XIV. EMPLOYMENT AND WORKER'S COMPENSATION [§ 9.362]

1. Beveridge, C.J., ed., *Employment Litigation Handbook* (Litig. Section, Am. Bar Ass'n 2d ed. 2010).
2. Heyser, M.K., ed., *Litigating the Workplace Harassment Case* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 2010).
3. Hollander, E.K. & D.W. Neel, *Employment Evidence* (James Publ'g 2021) (annual).
4. Larson, L.K., & T.A. Robinson, *Larson's Workers' Compensation Law* (Matthew Bender/LexisNexis 1997) (17 volumes, loose-leaf, semi-annual supplements, also available as downloadable set).
5. Lindner, L.A. et al., *Litigating the Class Action Wage and Hour Case* (Nat'l Bus. Inst. 2006) (seminar material).

6. McDonald, J.J., & F.B. Kulick, *Mental and Emotional Injuries in Employment Litigation* (Bureau of Nat'l Affs. 2d ed. 2001 & Supp. 2008).
7. Norton, S.P., & J.W. Green, *Employment Litigation* (Emp. & Lab. Rels. L. Comm., Litig. Section, Am. Bar Ass'n 2d ed. 2005).
8. Wilson, A.S., ed., *The Practitioner's Guide to Defense of EPL Claims* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 4th ed. 2018).
9. Zanglein, J.E. et al., *ERISA Litigation* (BNA Books 6th ed. 2017) (annual supplement).

XV. EMPLOYMENT AND WORKER'S COMPENSATION – Wisconsin-Specific [§ 9.363]

1. Harris, C.B. et al., *Handling the Workers' Compensation Case from Start to Finish* (Nat'l Bus. Inst. 2015) (seminar material).
2. Hughes, M.E. et al., *Workers' Compensation Hearings: Techniques & Strategies for Success* (Nat'l Bus. Inst. 2008) (seminar material).
3. Neal, J.D., & J. Danas, Jr., *Worker's Compensation Handbook* (State Bar of Wis. 9th ed. 2019 & Supp.) (available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Books>).
4. *Preparing for Your Compulsory Medical Exam* (State Bar of Wis. L. Off. Video 2010) (available as on-demand seminar, <https://marketplace.wisbar.org/CLE-Seminars>).
5. *Preparing for Your Compulsory Medical Exam: Spanish Version (Preparación Para Su Examen Médico Obligatorio)* (State Bar of Wis. L. Off. Video 2010) (available as on-demand seminar, <https://marketplace.wisbar.org/CLE-Seminars>).
6. Sholl, R.K. et al., *Hiring and Firing in Wisconsin* (State Bar of Wis. 7th ed. 2019 & Supp.) (available both in paperback and online through <https://marketplace.wisbar.org/Books>).
7. Wasserman, R.A., *A Guide to Wisconsin Employment Discrimination Law* (State Bar of Wis. 7th ed. 2019 & Supp.) (available both in paperback and online through <https://marketplace.wisbar.org/Books>).

XVI. MEDICAL MALPRACTICE AND MEDICINE [§ 9.364]

1. Baus, M.D., *Interpreting Medical Information: Finding the Clues for Your Case* (Nat'l Bus. Inst. 2008) (seminar material).
2. Dox, I.G. et al., *Attorney's Illustrated Medical Dictionary* (Thomson West 2002 & Supp. 2020).
3. Gray, R.N., & L.J. Gordy, *Attorneys' Textbook of Medicine* (Matthew Bender Elite Prods. 3d ed. 1949) (19 volumes, loose-leaf, quarterly supplements, available as eBook).
4. Hart, K.P. et al., *Deposing and Examining Doctors* (James Publ'g 2014).

5. *The Merck Manual for the Professional* (Merck & Co.), <https://www.merckmanuals.com/professional/> (free online resource).
6. O'Reilly, J.T. et al., *A Practitioner's Guide to Hospital Liability* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 2011).
7. Pegalis, S.E., *American Law of Medical Malpractice* (Clark Boardman Callaghan 3d ed. 2005) (three volumes, annual supplement).
8. Quinn, T.H., & J.H. Lawlor, *Medical Evidence* (James Publ'g 2016) (loose-leaf, annual supplement, includes illustrations on eReader).
9. Radnor, A.T., *Cross-Examining Doctors: A Practical Guide* (ALI CLE 2d ed. 2010).
10. Radnor, A.T., *Cross-Examining Psychiatrists and Psychologists: A Practical Guide* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 2014).
11. Stedman, T.L., *Stedman's Medical Dictionary* (Lippincott Williams & Wilkins 28th ed. 2005).
12. Stranding, S., ed., *Gray's Anatomy* (Elsevier 41st ed. 2015).
13. *Taber's Cyclopedic Medical Dictionary* (F.A. Davis Co. 23d ed. 2017).
14. *USP DI Advice for the Patient: Drug Information in Lay Language (formerly United States Pharmacopeia Dispensing Information)* (U.S. Pharmacopeial Convention 27th ed. 2007) (annual).

XVII. MEDICAL MALPRACTICE AND MEDICINE – Wisconsin-Specific [§ 9.365]

1. Centofanti, K.L., & D.M. Harden, *Using Medical Records to Prove Your Case* (Nat'l Bus. Inst. 2007) (seminar material).

XVIII. FAMILY [§ 9.366]

1. Ackerman, M.J. et al., *Psychological Experts in Divorce Actions* (Wolters Kluwer 7th ed. 2018) (annual supplement).
2. Altschuler, M.K., *Value of Pensions in Divorce* (Wolters Kluwer L. & Bus. 5th ed. 2014) (annual supplement).
3. Perkins, R.K., *Domestic Torts: Civil Lawsuits Arising from Criminal Conduct Within Family Relationships* (Clark Boardman Callaghan 2d ed. 2020).
4. Sullivan, M.E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families* (Fam. L. Section, Am. Bar Ass'n 3d ed. 2019).

XIX. FAMILY – Wisconsin-Specific [§ 9.367]

1. Arnett, M.B. et al., *Guardian ad Litem Handbook* (State Bar of Wis. 5th ed. 2018 & Supp.) (includes downloadable forms, available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Books>).
2. Bacal, K.A. et al., *As Family Court Judges See It: Top Mistakes Attorneys Make in Litigating Divorce* (Nat'l Bus. Inst. 2016) (seminar material).
3. Bailey, T.A., & L. Lau, *Family Law Casenotes and Quotes* (State Bar of Wis. 6th ed. 2017 & Supp.) (three volumes, approximately three updates per year, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>).
4. Barden, C.R. et al., *Marital Property Law & Practice in Wisconsin* (State Bar of Wis. 5th ed. 2019) (available both in perfect bound book and online through <https://marketplace.wisbar.org/Books>).
5. Beermann, M. et al., *Advising Older Clients and Their Families* (State Bar of Wis. 4th ed. 2020, 4th ed. 2021) (two volumes, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>).
6. Childs, M. et al., *Wisconsin Juvenile Law Handbook* (State Bar of Wis. 4th ed. 2017 & Supp.) (available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Books>).
7. Herman, G.M., *Family Law in Wisconsin: A Forms and Procedures Handbook* (State Bar of Wis. 10th ed. 2020 & Supp.) (two volumes, includes downloadable forms, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>).
8. Roberson, L., & H.S. Erlanger, *The Marital Property Classification Handbook* (State Bar of Wis. 4th ed. 2017) (available both in paperback and online through <https://marketplace.wisbar.org/Books>).
9. Velzen, R.L., *As Judges See It: Top Mistakes Attorneys Make in Family Court* (Nat'l Bus. Inst. 2019) (seminar material).

XX. MISCELLANEOUS PUBLICATIONS [§ 9.368]

1. Allen, S.K. et al., *Business Litigation & Dispute Resolution in Wisconsin* (State Bar of Wis. 3d ed. 2019 & Supp.) (available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Books>).
2. Anderson, C.N. et al., *Environmental Litigation and Toxic Torts* (Nat'l Bus. Inst. 2007) (seminar material).
3. Baxter, J.A. et al., *Bad Faith 101* (Nat'l Bus. Inst. 2010) (seminar material).
4. Baxter, J.A., & M.D. Malloy, *Bad Faith Insurance Claims in Wisconsin* (Nat'l Bus. Inst. 2013) (seminar material).
5. Beachy, S.K. et al., *Condemnation Law and Practice in Wisconsin* (State Bar of Wis. 2d ed. 2018 & Supp.) (available both in loose-leaf binder and online through <https://marketplace.wisbar.org/Booksx>).

6. Bitar, R.D. et al., *Handling the Police Liability Claim* (Nat'l Bus. Inst. 2013) (seminar material).
7. Blay, R.A. et al., *Wisconsin Foreclosures and Workouts* (Nat'l Bus. Inst. 2013) (seminar material).
8. Boston, G.W. et al., *Emotional Injuries: Law and Practice* (Clark Boardman Callaghan 1998) (loose-leaf, annual supplement).
9. Brown, K.A., & A.M. Hogan, eds., *Environmental Litigation: Law and Strategy* (Env't, Energy, & Res. Section, Am. Bar Ass'n 2d ed. 2019).
10. Brown, W.L. et al., *BOOT CAMP: Foreclosure and Loan Workout Procedures* (Nat'l Bus. Inst. 2015) (seminar material).
11. *Business Torts and Unfair Competition Handbook* (Antitrust L. Section, Am. Bar Ass'n 3d ed. 2013).
12. Callahan, M.T., & B.B. Bramble, *Discovery in Construction Litigation* (Michie/LexisNexis 5th ed. 2017) (annual supplement).
13. Conte, A., *Attorney Fee Awards* (Thomson West 3d ed. 2004 & Supp. 2021) (four volumes).
14. Eggen, J.M., *Toxic Torts in a Nutshell* (West Acad. Publ'g 6th ed. 2019).
15. Estevez, A.M. et al., *Public Accommodations Under the Americans with Disabilities Act: Compliance and Litigation Manual* (Thomson West 2020) (annual).
16. Ferlo, A.M. et al., *The NEPA Litigation Guide [National Environmental Policy Act]* (Env't, Energy & Res. Section, Am. Bar Ass'n 2d ed. 2012).
17. Finkelmeyer, C.F. et al., [Wisconsin Governmental Claims and Immunities Handbook](https://marketplace.wisbar.org/Books) (State Bar of Wis. 4th ed. 2020) (available both in paperback and online through <https://marketplace.wisbar.org/Books>).
18. Foerster, A.F., & C.G. Rolph, eds., *Toxic Tort Litigation* (Env't, Energy & Res. Section, Am. Bar Ass'n 2d ed. 2013).
19. Fonseca, J.R., & P.F. Fonseca, *Handling Consumer Credit Cases* (Clark Boardman Callaghan 3d ed. 1991 & Supp. 2021) (two volumes).
20. Fox, L.J., & S.R. Martyn, *Fair Fight: Legal Ethics for Litigators* (Litig. Section, Am. Bar Ass'n 2020).
21. Frangiamore, D., *How Insurance Companies Settle Cases* (James Publ'g 2021).
22. Frederickson, J.E. et al., *Litigating Insurance Coverage Claims: From Start to Finish* (Nat'l Bus. Inst. 2013) (seminar material).

23. Graupner, C.P. et al., *Eminent Domain: Key Trial Tactics* (Nat'l Bus. Inst. 2009) (seminar material).
24. Harakas, A.J. ed., *Litigating the Aviation Case* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 4th ed. 2017).
25. Hazelbaker, M. et al., *Litigating Disputes over Easements and Restrictive Covenants* (Nat'l Bus. Inst. 2014) (seminar material).
26. Kaminsky, A. et al., *A Complete Guide to Lead Paint Poisoning Litigation* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 1998).
27. King, R.C., *Toxic Mold Litigation* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 2d ed. 2006).
28. Klonoff, R.H., *Class Actions and Other Multi-Party Litigation in a Nutshell* (West Acad. Publ'g 5th ed. 2017).
29. Maduff, A.B., *Litigating Sexual Harassment & Sex Discrimination Cases* (James Publ'g 2020).
30. Martinez, A.I. et al., *Traffic Law and Practice in Wisconsin* (State Bar of Wis. 5th ed. 2016 & Supp.) (two volumes, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>).
31. McQuillin, E., *The Law of Municipal Corporations* (Clark Boardman Callaghan 3d ed. 1997) (31 volumes, annual supplement).
32. *Mind Games: Winning Tools and Strategies in Proving Traumatic Brain Injury* (Wis. Ass'n for Just., Brain Inj. Ass'n of Wis. 2010) (seminar material).
33. Mishlove, A., & J. Nesci, *Wisconsin OWI Defense: The Law and Practice* (Laws. & Judges Publ'g Co. 2d ed. 2020).
34. Murphy, C.P. et al., *Obtaining Information from the Government in Discovery and Disclosure-Related Damages Actions Against the Government* (Tax Mgmt. Inc. 2012).
35. Odom, J.S., *A Judge's Benchbook for the Servicemembers Civil Relief Act* (Standing Comm. on Legal Assistance for Mil. Pers., Am. Bar Ass'n 2011).
36. Platt, L.S., & C. Ventrell-Monsees, *Age Discrimination Litigation* (James Publ'g 2000 & Supp. 2018) (two volumes).
37. Presser, S.B., *Piercing the Corporate Veil* (Clark Boardman Callaghan 2021) (annual).
38. Rossman, S.T. et al., *Consumer Class Actions* (Nat'l Consumer L. Ctr. 10th ed. 2020) (with companion website).
39. Rubenstein, W.B. et al., *Newberg on Class Actions* (Laws. Coop. Publ'g 5th ed. 2011 & Supp. 2021) (10 volumes).

40. Schaffner, J.E., & J.I. Fershtman, *Litigating Animal Law Disputes: A Complete Guide for Lawyers* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 2008).
41. Smith, T.S. et al., *Cell Phone Distraction, Human Factors, and Litigation* (Laws. & Judges Publ'g Co. 2d ed. 2018).
42. Soley, D.A., *Business Torts Litigation* (Litig. Section, Am. Bar Ass'n 2d ed. 2005).
43. Sullivan, S.M. et al., [*Anderson on Wisconsin Insurance Law*](#) (State Bar of Wis. 8th ed. 2020 & Supp.) (two volumes, annual supplement, available both in loose-leaf binders and online through <https://marketplace.wisbar.org/Books>).
44. Taylor, R.A., *Civil Rights Litigation: Representing Plaintiffs Today* (Am. Bar Ass'n 2013).
45. Taylor, R.A., *Foreclosure Defense: A Practical Litigation Guide* (Am. Bar Ass'n 2d ed. 2020).
46. Walkowiak, V.S., & O.R. Rodriguez, eds., *The Attorney-Client Privilege in Civil Litigation: Protecting and Defending Confidentiality* (Tort Trial & Ins. Prac. Section, Am. Bar Ass'n 7th ed. 2019).
47. Whited, F.K., *Drinking/Driving Litigation: Criminal and Civil* (Clark Boardman Callaghan 2d ed. 1998) (annual supplement) (four volumes).
48. Zuckerman, T.I., *Environmental Insurance Litigation: Law & Practice* (Clark Boardman Callaghan 2d ed. 2000) (semiannual updates).

XXI. SOURCES AND SERVICES [§ 9.369]

1. Internet sites of interest

American Association for Justice
(formerly Association of Trial Lawyers of America (ATLA))
<https://www.justice.org>

American Bar Association Litigation Section
<https://www.americanbar.org/groups/litigation>

BadgerLink
<https://badgerlink.dpi.wi.gov/>

Free access to newspaper articles and abstracts and full text of academic, medical, and business journals.

DFI's Corporate Registration Information System (CRIS)

<https://www.wdfi.org/apps/CorpSearch/Search.aspx>

Registry of corporations doing business in Wisconsin. Includes name and address of registered agent, annual report reference numbers.

Directory of Licensed Insurers from the Wisconsin Office of the Commissioner of Insurance

<https://sbs.naic.org/solar-external-lookup/>

Fastcase

<https://www.fastcase.com/>

Free access to 50-state, federal, bankruptcy, and tax court case law for State Bar of Wisconsin members.

FindLaw

<https://www.findlaw.com/>

Comprehensive legal portal, includes links to case law, federal and state government pages, and legal resources.

Google Scholar

<https://scholar.google.com>

Free access to search and view legal opinions.

National Association of Insurance Commissioners

Registered Agents for Insurance Companies

<https://sbs.naic.org/solar-external-lookup/>

National Association of Professional Process Servers

<https://napps.org/Default.aspx>

State Bar of Wisconsin

<https://www.wisbar.org/>

Free legal resources for members, including case law searching, rules, and weekly email notification service of new decisions.

United States Courts Homepage

<https://www.uscourts.gov/>

Includes current federal rules, links to local rules, and links to all federal courts with an online presence.

Wisconsin Association for Justice

(formerly Wisconsin Academy of Trial Lawyers (WATL))

<https://www.wisjustice.org/>

Includes archive of publication *The Verdict*.

Wisconsin Briefs Online from the University of Wisconsin Law Library

<https://repository.law.wisc.edu/s/uwlaw/item/search?collectionId=84634>

Includes briefs filed with the Wisconsin Supreme Court and Court of Appeals in published cases and unpublished cases from approximately 1993 through July 2009.

Wisconsin Circuit Court Access (CCAP)

<https://wcca.wicourts.gov/>

Docket sheets from participating Wisconsin circuit courts.

Wisconsin Court System Homepage

<https://www.wicourts.gov/>

Released opinions, table of pending cases, disposition lists, oral argument schedules and audio, rules, etc.

Wisconsin Supreme Court and Court of Appeals Case Access

<https://wscca.wicourts.gov/index.xsl>

Provides access to appeal docket sheets, noting filing history, responsible attorneys, case status, electronically filed briefs.

2. Guides and Sources for Legal Apps (from legal publishers and libraries)

Fastcase Mobile

<http://www.fastcase.com/tag/mobile/>

LexisNexis Mobile Solutions

<https://www.lexisnexis.com/en-us/products/mobile.page>

Turner, K., *Android Applications for Lawyers, Law Faculty and Law Students* (University of Wis. Law School Library)

<https://researchguides.library.wisc.edu/friendly.php?s=android>

UCLA School of Law Darling Law Library, *Mobile Applications for Law Students and Lawyers*

<https://libguides.law.ucla.edu/mobilelegalapps>

Westlaw Legal Apps

<https://legalsolutions.thomsonreuters.com/law-products/solutions/mobile-apps>

Zook, J., *iPad Apps for Lawyers, Law Faculty and Law Students* (University of Wis. Law School Library)

<https://researchguides.library.wisc.edu/friendly.php?s=ipadappsforlawyers>

3. Document Delivery Services (nonprofit)

University of Wisconsin TechSearch Article Delivery and Research Services for Professionals

<https://wts.wisc.edu/>

A fee-based service through the Wendt Engineering Library at UW-Madison. Researchers will conduct print and electronic research using the library's extensive collection; preliminary patent and trademark searching, document delivery.

Wisconsin State Law Library's Computerized Legal Research Service & Document Delivery

<https://wilawlibrary.gov/services/request.html>

Cases, articles, and book excerpts faxed, mailed, or emailed for a fee; fee-based Lexis or Westlaw searches conducted.

4. Expert Witness Services

American Association of Legal Nurse Consultants

<http://www.aalnc.org/>

American Lawyer Media (ALM) Experts

<https://www.almexperts.com/>

For locating expert witnesses.

American Medical Forensic Specialists

<https://www.amfs.com/>

Medical expert witnesses.

Experts.com
<https://www.experts.com/>
Expert witness directory.

The TASA Group
<https://www.tasanet.com/>
For locating expert witnesses.

5. Courtroom Graphics

Great Big Pictures, Inc.
Madison: (608) 257-7071 or (800) 236-8925
<https://www.gbpinc.com/>

6. Medical Models and Illustrations

Carolina Biological Supply Co.
(800) 334-5551
<https://www.carolina.com/>

The Doe Report/Medical Legal Art
(800) 338-5954
<https://www.doereport.com/>

7. Legal Publishers

ABA Publishing, American Bar Association
321 North Clark St.
Chicago, IL 60654
(800) 285-2221
<https://www.americanbar.org/products/>

ABA titles are also available to State Bar of Wisconsin members at a 15% discount.
<https://www.wisbar.org/aboutus/membership/membershipandbenefits/Pages/Office-Discounts.aspx> (click “ABA Books Discount”)

ALI CLE (formerly ALI-ABA)
4025 Chestnut St.
Philadelphia, PA 19104
(800) CLE-NEWS
<https://www.ali-cle.org/>

HalfMoon Education Inc.
5828 Arndt Ln.
Eau Claire, WI 54701
(715) 835-5900
Fax: (715) 835-6066
<https://www.halfmoonseminars.org>

James Publishing
3505 Cadillac Ave., Suite P-101
Costa Mesa, CA 92626
(866) 725-2637
<https://jamespublishing.com/>

Juris Publishing
52 Elm Street, Suite 7
Huntington, NY 11743
(631) 350-2100
<http://www.jurispub.com>

Law Journal Press/American Lawyer Media
120 Broadway, 5th Floor
New York, NY 10271
(877) 807-8076
<https://www.lawcatalog.com/>

Law Partner Publishing, LLC
(602) 993-1937
<http://lawpartnerpublishing.com>

Lawyers and Judges Publishing Co.
P.O. Box 30040
Tucson, AZ 85751-0040
(520) 323-1500
<https://www.lawyersandjudges.com/>

LexisNexis (Online Service)
(800) 543-6862 (for online support)
<https://advance.lexis.com/>

Lexis Publishing (includes Matthew Bender, Shepards, Michie)
(800) 833-9844
<https://store.lexisnexis.com>

Lorman Education Services
P.O. Box 509
Eau Claire, WI 54702-0509
(866) 352-9539
Fax: (715) 802-1131
<https://www.lorman.com/>

LRP Media Group (includes Jury Verdict Research)
360 Hiatt Dr.
Palm Beach Gardens, FL 33418
(800) 515-4577 ext. 6511 (web subscriptions)
(800) 341-7874 (customer service)
<https://www.lrp.com/>

National Business Institute
PO Box 3067

Eau Claire, WI 54702
(800) 930-6182
<https://www.nbi-sems.com>

Practising Law Institute (PLI)
1177 Avenue of the Americas, 2nd Floor
New York, NY 10036
(800) 260-4754
Fax: (800) 321-0093
<https://www.pli.edu/>

State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(608) 257-3838 / (800) 728-7788
<https://marketplace.wisbar.org>

Thomson Reuters & Westlaw
610 Opperman Drive
Eagan, MN 55123
(800) 328-4880
<https://legal.thomsonreuters.com/en/products/law-books>
<https://www.westlaw.com>

University of Wisconsin Law School CLE for Wisconsin (CLEW)
975 Bascom Mall
Room 2348
Madison, WI 53706
(608) 262-3833 / (800) 355-5573
<https://law.wisc.edu/clew/>

Wolters Kluwer Law & Business (includes Aspen Publishers & CCH)
(800) 234-1660
<https://www.wolterskluwer.com/en/solutions/legal-regulatory>

Chapter 10

Costs upon Frivolous Claims and Defenses

NOTE: This chapter of this State Bar of Wisconsin publication was updated by the State Bar's Professional Development Department staff.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 191; and all references to Wisconsin Supreme Court Rules (SCR) are to the rules as amended by supreme court orders through May 9, 2022.

I. INTRODUCTION [§ 10.370]

This outline summarizes the rules governing the application of [Wis. Stat.](#) § 802.05, signing of pleadings, motions, and other papers, and [Wis. Stat.](#) § 895.044, damages for maintaining certain claims and counterclaims. It also presents the possible ethical implications of a frivolous claim.

II. THE STATUTES: [Wis. Stat.](#) §§ 802.05 and 895.044 [§ 10.371]

NOTE: [Wis. Stat.](#) § 895.044 was enacted in 2011 as part of the omnibus tort reform act, 2011 Wis. Act 2. That legislation did not amend or repeal [Wis. Stat.](#) § 802.05 but created a separate and somewhat inconsistent procedure in [Wis. Stat.](#) § 895.044. For example, [Wis. Stat.](#) § 895.044 *requires* the court to award sanctions upon a finding of frivolousness under certain circumstances. The sanctions include all actual costs resulting from the frivolous pleading, including actual reasonable attorney fees. Moreover, [Wis. Stat.](#) § 895.044 requires a finding of frivolousness by “clear and convincing evidence,” while [Wis. Stat.](#) § 802.05(3) requires a court to “determine that [[Wis. Stat.](#) § 802.05(2)] has been violated.” There may be a more rigorous burden of proof for [Wis. Stat.](#) § 895.044 to be applicable as opposed to [Wis. Stat.](#) § 802.05. Thus, a court could find the evidence relating to the frivolous conduct insufficient to satisfy proof by “clear and convincing evidence,” as required by [Wis. Stat.](#) § 895.044, but still determine the conduct to be frivolous pursuant to [Wis. Stat.](#) § 802.05.

A. Sanctions Under [Wis. Stat.](#) § 802.05 [§ 10.372]

See [Wis. Stat.](#) § 802.05(3).

1. Court *may* impose appropriate sanctions on attorneys, law firms, or parties if a claim or defense is found frivolous. [Wis. Stat.](#) § 802.05(3).
2. Sanctions are limited to deterring repetition of conduct by others and may consist of a nonmonetary directive, an order to pay a penalty into court, or an order directing payment of some or all of movant’s attorney fees and costs. [Wis. Stat.](#) § 802.05(3)(b).
3. Law firms will be held jointly liable for violations committed by partners, associates, and employees. [Wis. Stat.](#) § 802.05(3)(a)1.

B. Frivolous Claims and Defenses [§ 10.373]

For a claim or defense to be frivolous, circuit court must find that the attorney or unrepresented party:

1. Advanced a claim or defense for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase litigation costs, [Wis. Stat.](#) § 802.05(2)(a); or
2. Knew, or should have known, that the claim or defense
 - a. Was not warranted by existing law, [Wis. Stat.](#) § 802.05(2)(b);
 - b. Could not be supported by a nonfrivolous argument for the extension, modification, or reversal of existing law, [Wis. Stat.](#) § 802.05(2)(b);
 - c. Had no evidentiary support or was not likely to have evidentiary support after a reasonable opportunity for further investigation, [Wis. Stat.](#) § 802.05(2)(c); or

- d. Contained denials of facts that were not warranted or were not reasonably based on a lack of information or belief, [Wis. Stat.](#) § 802.05(2)(d).

CAVEAT: Per [Wis. Stat.](#) § 802.05(2m), under limited-scope representation rules, an attorney

may draft or assist in drafting a pleading, motion, or document filed by an otherwise self-represented person ... [and] may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false, or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

C. Sanctions Under [Wis. Stat.](#) § 895.044 [§ 10.374]

See [Wis. Stat.](#) § 895.044.

1. Party may move at any time during proceeding or upon judgment to have claim or defense found frivolous. [Wis. Stat.](#) § 895.044(2).
2. Party served with motion has 21 days to withdraw or amend claim or defense alleged to be frivolous.
 - a. If the party fails to comply within 21 days and the claim or defense is found frivolous, court *must* impose sanctions. [Wis. Stat.](#) § 895.044(2)(b).
 - b. If the party complies within 21 days and the claim or defense is found frivolous, court *may*, at its discretion, impose sanctions. [Wis. Stat.](#) § 895.044(2)(a).
3. Standard for finding frivolousness under [Wis. Stat.](#) § 895.044 is *clear and convincing evidence*. [Wis. Stat.](#) § 895.044(2).
4. Sanctions include all actual costs resulting from the conduct, including actual reasonable attorney fees.
 - a. In determining whether to award sanctions, and the appropriate amount of sanctions, court must take into consideration any timely withdrawal or correction made by party served with the motion. [Wis. Stat.](#) § 895.044(2)(a).
 - b. Costs and fees may be assessed against party bringing the frivolous claim, attorney representing the party, or both. [Wis. Stat.](#) § 895.044(6).
 - c. Costs and fees may be assessed jointly and severally or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

III. APPLICABLE STANDARDS [§ 10.375]

A. Clear Preponderance of Evidence: [Wis. Stat.](#) § 802.05 [§ 10.376]

COMMENT: Some of the cases cited in this section and in sections [10.8–9](#), *infra*, were decided

under former [Wis. Stat.](#) § 814.025 before its repeal by supreme court order on July 1, 2005. The rationale from those decisions should apply under [Wis. Stat.](#) § 802.05, which was repealed and recreated by the same supreme court order, also effective as of July 1, 2005. As noted in sections [10.2](#) and [10.5](#), *supra*, a “clear and convincing evidence” standard applies to a finding of frivolousness under [Wis. Stat.](#) § 895.044. Wis. Sup. Ct. Order No. 03-06, 2005 WI 38, 278 Wis. 2d xii (eff. July 1, 2005).

1. A finding of frivolousness must be supported by a clear preponderance of the evidence. *Sommer v. Carr*, 99 Wis. 2d 789 (1981).
2. All doubts are resolved in favor of finding the claim nonfrivolous. *Howell v. Denomie*, 2005 WI 81, ¶ 8, 282 Wis. 2d 130; *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220 (1994).

B. Subjective Standard [§ 10.377]

1. Finding that the claim or defense was advanced for improper purpose must be based on a subjective standard (such as the party’s motives). *Robertson-Ryan & Assocs. v. Pohlhammer*, 112 Wis. 2d 583 (1983).
2. Attorney who knows or should have known that client is asserting a claim solely to harass or injure opposing party will be held to have the same motive as client. *Elmakias v. Wayda*, 228 Wis. 2d 312 (Ct. App. 1999).

C. Objective Standard [§ 10.378]

1. Finding that a claim or defense is not warranted by existing law or could not be supported by a nonfrivolous argument for the extension, modification, or reversal of existing law must be based on objective standard (i.e., what a *reasonable* attorney or party knew or should have known under same or similar circumstances). *Sommer v. Carr*, 99 Wis. 2d 789 (1981).
2. As to what a reasonable attorney should know, [Wis. Stat.](#) § 802.05(2) mandates the affirmative duty of a reasonable inquiry before proceeding with a claim or filing any paper. Lawyers must inform themselves about the facts of the case and the applicable law and determine that they can make good-faith arguments in support of their clients’ positions. *Riley v. Isaacson*, 156 Wis. 2d 249 (Ct. App. 1990); [SCR](#) 20.3.1(a) ABA cmt.
3. What a reasonable attorney or party knew or should have known is a question of fact, but whether knowledge of the facts would then lead a reasonable attorney or party to conclude that an action is frivolous is a question of law. *Belich v. Szymaszek*, 224 Wis. 2d 419 (Ct. App. 1999) (listing factors court will consider in determining reasonableness of attorney’s inquiry into facts).

IV. PROCEDURE: WHEN AND HOW ISSUE ARISES [§ 10.379]

A. Original Proceeding [§ 10.380]

1. Award of costs under [Wis. Stat.](#) § 802.05 may be sought only in original proceeding in which alleged frivolous claim or defense was advanced. *Tower Special Facilities v. Investment Club, Inc.*, 104 Wis. 2d 221 (Ct. App. 1981).

2. [Wis. Stat.](#) § 802.05 applies not only to arguments raised in pleadings but also to arguments raised during court proceedings. *Gardner v. Gardner*, 190 Wis. 2d 216 (Ct. App. 1994). *But see State ex rel. Robinson v. Town of Bristol*, 2003 WI App 97, 264 Wis. 2d 318 (declining to follow *Gardner*).
3. A claim that is not necessarily frivolous when filed may become frivolous when counsel knows or should know that there is no reasonable basis for continuing lawsuit. *Riley v. Lawson*, 210 Wis. 2d 478 (Ct. App. 1997).

B. How Initiated [§ 10.381]

See [Wis. Stat.](#) § 802.05(3)(a).

1. Sanctions issue must be raised by separate motion; must describe specific conduct alleged to violate [Wis. Stat.](#) § 802.05(2). [Wis. Stat.](#) § 802.05(3)(a)1.

Safe-harbor period—A motion for sanctions can be filed with court only if the challenged claim is not withdrawn within 21 days after service of the sanctions motion on the opposing party. A motion is required; informal warnings are not enough. *Ten Mile Invs., LLC v. Sherman*, 2007 WI App 253, ¶¶ 3, 18, 306 Wis. 2d 799.

NOTE: The issue of sanctions should be raised promptly after the inappropriate paper is filed. The safe-harbor provision is procedural and precludes a party from serving its motion for sanctions after judgment. *Ten Mile Invs.*, 2007 WI App 253, 306 Wis. 2d 799. However, a motion for sanctions can be filed postjudgment if the required safe-harbor notice was complied with prior to judgment. *Veit v. Frater*, 2019 WI App 33, 388 Wis. 2d 144.

2. On the “court’s initiative,” the court may enter an order describing the violation and directing the attorney or unrepresented party to show cause why that party has not violated the statute; there is no safe harbor when the court acts on its own show-cause order. [Wis. Stat.](#) § 802.05(3)(a)2.

C. Jurisdiction [§ 10.382]

1. Only the *court* is empowered to find frivolousness or to assess sanctions, costs, and reasonable attorney fees. [Wis. Stat.](#) § 802.05(3).
2. [Wis. Stat.](#) § 802.05 does not apply to discovery requests and responses or discovery motions. [Wis. Stat.](#) § 802.05(5).

D. Finding of Fact [§ 10.383]

Circuit court must:

1. Find whether party advanced a frivolous claim or defense.

NOTE: The court may find any or all of several claims in a single action frivolous. Janine P. Geske & William C. Gleisner III, *Frivolous Sanctions Law in Wisconsin*, Wis. Law., Feb. 2006, at 2.

2. Determine appropriate sanction(s) in court's discretion; sanctions should be narrowly tailored to correct specific misconduct.
3. Factors that the court may consider in deciding whether to impose sanctions include:
 - a. Whether frivolous conduct was part of a pattern of activity or an isolated event;
 - b. Whether conduct affected the entire pleading or an isolated claim or defense; and
 - c. Whether the attorney or party has engaged in similar conduct in other litigation.

E. Written Submissions or Hearing [§ 10.384]

Whether a motion for sanctions should be decided on the basis of written submissions, oral argument, or evidentiary hearing depends on the circumstances and is within the court's discretion.

F. Finding After Verdict [§ 10.385]

Per [Wis. Stat.](#) § 802.05 cmts., *reprinted in* Wis. Sup. Ct. Order 03-06, 2005 WI 38, 278 Wis. 2d xiii, a finding of frivolousness is not precluded even if claim

1. Survives motion to dismiss, or
2. Survives motion for directed verdict.

V. PRACTICE SUGGESTIONS [§ 10.386]

A. Client Receiving Award [§ 10.387]

If client is the beneficiary of [Wis. Stat.](#) § 802.05 attorney-fees sanctions, establish reasonableness of attorney fees by introducing:

1. Testimony of other attorneys as to what reasonable lawyers in general locality charge for the same or similar services;
2. Retainer contract between attorney and client fixing rate of compensation; or
3. Itemized statement setting forth hours devoted to the frivolous claims and work performed, with [Wis. Stat.](#) § 814.04 bill of costs.

B. Client Risking Frivolous Claim [§ 10.388]

If client insists on advancing a claim or defense that may be frivolous:

1. Advise client in writing of possible consequence under [Wis. Stat.](#) § 802.05; and
2. Seriously consider a petition to withdraw under [SCR 20:1.16](#), because attorneys and law firms, not the client, are responsible for sanctions imposed for violations of [Wis. Stat.](#) § 802.05(2)(b). *See* Fed. R. Civ. P. 11 advisory committee's note, *reprinted in* [Wis. Stat.](#) § 802.05 cmts.

VI. ETHICAL IMPLICATIONS: [SCR 20:3.1](#) [§ 10.389]**A. The Ethics Rule [§ 10.390]**

[SCR 20:3.1\(a\)](#) provides that in representing a client, a lawyer must not:

1. Knowingly advance a claim or defense that is unwarranted under existing law or cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law;
2. Knowingly advance a frivolous factual position; or
3. File a suit, assert a position, conduct a defense, delay a trial, or take other action when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

B. Ethical Obligation [§ 10.391]

Opposing party's attorney is ethically obligated to report awards under [Wis. Stat.](#) § 802.05 to the Office of Lawyer Regulation if the attorney knows opposing counsel *knowingly* proceeded contrary to [SCR 20:3.1\(a\)](#) and if the behavior speaks to the honesty, trustworthiness, or fitness of the person as a lawyer in other respects. [SCR 20:8.3](#).

CAVEAT: Under the limited-scope representation rule ([SCR 20:1.2\(c\)](#)), a lawyer can rely on the otherwise self-represented person's representation of facts, unless the lawyer has reason to believe that such representations are false or materially insufficient; in that case, the lawyer must make an independent reasonable inquiry into the facts. [SCR 20:3.1\(am\)](#).

C. Subjective Standard [§ 10.392]

A violation of [SCR 20:3.1\(a\)](#) requires that a claim or defense unwarranted under existing law has been *knowingly* advanced. *In re Disciplinary Proceedings Against Lauer*, 108 Wis. 2d 746 (1982).

D. Clear and Satisfactory Evidence [§ 10.393]

A finding of frivolousness under the rules of civil procedure need only be supported by a preponderance of the evidence; a violation of [SCR 20:3.1\(a\)](#) must be established by clear and satisfactory evidence. *In re Disciplinary Proceedings Against Lauer*, 108 Wis. 2d 746, 758 (1982).

E. No Automatic Violation [§ 10.394]

An assessment of costs does not itself constitute a violation of [SCR 20:3.1\(a\)](#). *In re Disciplinary Proceedings Against Lauer*, 108 Wis. 2d 746, 758 (1982).

Chapter 11

Notice of Claim and Limitation of Liability

Jesse B. Blocher

Peter M. Young

Habush Habush & Rottier S.C.®

NOTE: This chapter is intended only as a guide and reference to statutory provisions and case law; it does not serve as a substitute for checking the appropriate statute, statutory history, and relevant federal and state case law.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 140; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-113 (Apr. 19, 2022).

I. INTRODUCTION [§ 11.395]

This chapter summarizes statutory notice-of-claim and limitation-of-liability provisions for the most common causes of action. Statutory and judicially developed immunities are included because of their relationship to limitation-of-liability provisions, especially in the governmental area. The major emphasis of this chapter is on claims against the state and governmental subdivisions. *See generally* Corey F. Finkelmeyer et al., [*Wisconsin Governmental Claims and Immunities Handbook*](#) (State Bar of Wis. 4th ed. 2020).

II. NOTICE OF CLAIM [§ 11.396]

A. Claims Against Governmental Subdivisions [§ 11.397]

1. Applicability

- a. Applies to political corporations and governmental subdivisions or agencies and their officers, officials, agents, or employees. [Wis. Stat.](#) § 893.80(1d).

(1) Towns. [Wis. Stat.](#) § 60.44(1).

(2) Villages. [Wis. Stat.](#) § 61.51(4).

(3) Cities. [Wis. Stat.](#) § 62.25(1).

(4) Counties. [Wis. Stat.](#) § 59.07(1).

(5) School districts. [Wis. Stat.](#) § 118.26.

- b. [Wis. Stat.](#) § 893.80 does not apply to statutory schemes that contain a more restrictive limitation period than the 120-day notice-of-claim requirements.

(1) Actions commenced under Wisconsin's public records and open meetings laws, [Wis. Stat.](#) §§ 19.31–.37, 19.81–.98. [Wis. Stat.](#) § 893.80(8); *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597 (1996).

- (2) Actions brought pursuant to safe-drinking-water statute, [Wis. Stat.](#) § 281.99, or claims against the interstate insurance product regulation commission. [Wis. Stat.](#) § 893.80(8).
- (3) Actions appealing a county's denial of request for tax-exempt status for property pursuant to [Wis. Stat.](#) § 70.11(20). *Little Sissabagama Lake Shore Owners Ass'n v. Town of Edgewater*, 208 Wis. 2d 259, 263 (Ct. App. 1997).
- (4) Actions appealing special assessments pursuant to [Wis. Stat.](#) § 66.0703(12)(a) (formerly [Wis. Stat.](#) § 66.60(12)(a)). *Gamroth v. Village of Jackson*, 215 Wis. 2d 251, 254 (Ct. App. 1997).
- (5) Actions for certiorari pursuant to [Wis. Stat.](#) § 59.694(10). *Kapischke v. County of Walworth*, 226 Wis. 2d 320, 327 (Ct. App. 1999).
- (6) Actions by town challenging annexation of town land. *Town of Burke v. City of Madison*, 225 Wis. 2d 615, 627 (Ct. App. 1999).
- (7) Appeal of a condemnation award. *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 28, 265 Wis. 2d 422.
- (8) Actions compelling city to comply with direct-legislation statute. *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 8, 304 Wis. 2d 702.
- (9) Actions under a statute that permits injunctive relief. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 822–23 (1998).

NOTE: *Town of Burke* established a three-factor test for when a specific statute exempts a claim from notice-of-claim requirements: (1) a specific statutory scheme for which a plaintiff seeks exemption, (2) a legislative preference for prompt resolution of the type of claim that would be hindered by enforcing the notice-of-claim requirement, and (3) a furtherance of the legislative purpose in enacting [Wis. Stat.](#) § 893.80. *Town of Burke*, 225 Wis. 2d at 625; see also *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶¶ 23–24, 335 Wis. 2d 720.

- c. Agent limited to persons who have so-called master-servant relationship with governmental entity. *Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 729–30 (Ct. App. 1995).

Agent includes “volunteer” as defined in [Wis. Stat.](#) § 893.80(1b)(a)–(c).

NOTE: Governmental bodies, officers, and employees can procure insurance without waiving the provisions of [Wis. Stat.](#) ch. 893 and without providing a basis for denial of a person's status as an officer, agent, or employee of a governmental body. [Wis. Stat.](#) § 893.80(9).

NOTE: The government-contractor defense is available to contractors if (1) the governmental authority approves reasonably precise specifications, (2) the contractor's actions conform to the specifications, and (3) the contractor warns of possible dangers

associated with the specifications. *Bronfield v. Pember Co.*, 2010 WI App 150, 330 Wis. 2d 123 (extending government-contractor defense to subcontractor); *Jankee v. Clark Cnty.*, 222 Wis. 2d 151 (Ct. App. 1998), *rev'd on other grounds*, 2000 WI 64, 235 Wis. 2d 700.

NOTE: Contractor immunity is only available when municipality, if acting through its own employees, would be immune. In other words, contractor's action must be exercise of judicial, quasi-judicial, legislative, or quasi-legislative functions. Failure to perform work proficiently is not subject to immunity. *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, 350 Wis. 2d 509. *But see Thorsland v. Wolter*, No. 2016AP91, 2016 WL 5923281 (Wis. Ct. App. Oct. 12, 2016) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (holding that requirements for agency with state may be different than for municipality).

NOTE: For a government contractor to be immune, the contractor must prove that (1) the governmental entity approved the contractor's reasonably precise specifications and the contractor was following those specifications at the time of the injury; and (2) the conduct for which immunity is sought implemented the same governmental entity's decisions, which were made during the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions. *Coolidge A L.L.C. v. City of Waukesha*, No. 2018AP1441, 2020 WL 3443521, ¶ 15 (Wis. Ct. App. June 24, 2020) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (citing *Melchert v. Pro Elec. Contractors*, 2017 WI 30, ¶¶ 19–20, 374 Wis. 2d 439).

- d. Political corporations include state university hospitals and clinics. *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 31, 302 Wis. 2d 358.
 - e. See section [11.4](#), *infra*, for claims against state employees.
 - f. See section [11.17](#), *infra*, for governmental immunities.
2. Notice requirements
- a. In general

Written notice of the circumstances of the claim must be provided within 120 days after the “happening of the event giving rise to the claim.” [Wis. Stat.](#) § 893.80(1d)(a). However, in the case of alleged nuisance, each alleged nuisance is a separate event to which a new 120-day notice period attaches. *Yacht Club at Sister Bay Condo. Ass'n v. Village of Sister Bay*, 2019 WI 4, ¶¶ 25–27, 385 Wis. 2d 158. *But see Ebert v. Village of Gresham*, No. 2019AP2178, 2020 WL 6278316 (Wis. Ct. App. Oct. 27, 2020) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), stating that a continued nuisance does not constitute individual, separate events triggering the exception to the 120-day notice period discussed in *Yacht Club at Sister Bay Condominium Ass'n*, 2019 WI 4, 385 Wis. 2d 158.

- (1) [Wis. Stat.](#) § 893.80(1d)(a) is notice-of-injury statute under which notice is condition of fact requisite to liability. *Elm Park, Iowa, Inc. v. Denniston*, 92 Wis. 2d 723, 729–30 (Ct. App. 1979).

- (2) Purpose of statute is to allow governmental authorities to promptly investigate claim. *Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist.*, 110 Wis. 2d 1, 5 (Ct. App. 1982).
 - (3) Both notice of injury and notice of claim are procedural prerequisites for maintaining cause of action under [Wis. Stat.](#) § 893.80. *Gutter v. Seamandel*, 103 Wis. 2d 1, 10 (1981).
 - (4) Notice requirements do not apply to claims for contribution. *Geiger v. Calumet Cnty.*, 18 Wis. 2d 151 (1962).
 - (5) Notice requirements apply to counterclaims. *City of Milwaukee v. Milwaukee Civic Devs., Inc.*, 71 Wis. 2d 647 (1976).
- b. Content of notice

- (1) Under [Wis. Stat.](#) § 893.80(1d)(a), notice must
 - (a) Be in writing;
 - (b) Describe circumstances giving rise to claim; and
 - (c) Contain signature of party, agent, or attorney.

NOTE: Notice given on behalf of a class of unidentified claimants is insufficient, but simply because the notice identifies a class does not render it insufficient for all individual claimants identified. *Townsend v. Neenah Joint Sch. Dist.*, 2014 WI App 117, ¶¶ 15, 16, 358 Wis. 2d 618; *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208 (Ct. App. 1996).

- (2) Under [Wis. Stat.](#) § 893.80(1d)(a), failure to give notice does not bar action on claim if
 - (a) Defendant had actual notice of claim, and
 - (b) Defendant not prejudiced by failure to give requisite notice.

NOTE: Failure to strictly comply with the notice requirement is not a jurisdictional bar under [Wis. Stat.](#) § 893.80(1d)(a). Rather, it is an affirmative defense that must be raised or deemed waived, distinguishing [Wis. Stat.](#) § 893.80(1d)(a) from [Wis. Stat.](#) § 893.82(3), under which lack of strict compliance is not a waivable defense. *Maple Grove Country Club, Inc. v. Maple Grove Ests. Sanitary Dist.*, 2019 WI 43, ¶¶ 33–36, 386 Wis. 2d 425.

If notice is not timely given, governmental entity must be prejudiced for the claim to be barred. “Passage of time” alone is insufficient to show prejudice as a matter of law. Even after substantial passage of time, there may be a question of fact as to whether governmental entity was prejudiced. *Clark v. League of Wis. Muns. Mut. Ins. Co.*, 2021 WI App 21, ¶ 23, 397 Wis. 2d 220.

- (3) Actual notice is equivalent to actual knowledge; constructive notice not sufficient. *Elkhorn Area Sch. Dist.*, 110 Wis. 2d at 5–6.
 - (4) Under *Felder v. Casey*, 139 Wis. 2d 614 (1987), *rev'd on other grounds*, 487 U.S. 131 (1988), actual-notice standard will usually be met when document is submitted that has
 - (a) Recited facts giving rise to injury, and
 - (b) Indicated plaintiff's intent to hold defendant responsible for damages.
- c. Serving notice
- (1) Serve on defendant (as set forth in [Wis. Stat.](#) § 801.11) within 120 days after event giving rise to claim. [Wis. Stat.](#) § 893.80(1d)(a).
 - (2) For medical malpractice claims, applicable time periods are given in [Wis. Stat.](#) §§ 893.55(1m), (2), and (3) and 893.56. [Wis. Stat.](#) § 893.80(1m).
 - (3) For claims for negligent inspection of property, within one year after discovery of negligent act or omission or date on which, in exercise of reasonable diligence, negligent act or omission should have been discovered. [Wis. Stat.](#) § 893.80(1p).
3. Claim requirements
- a. In general
- (1) Filing claim is condition precedent to bringing or maintaining action. [Wis. Stat.](#) § 893.80(1d).
 - (2) Purpose of notice requirement is to allow defendant to pay claim without litigation. *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 53 (1984).
 - (3) Governmental subdivisions may be estopped from using absence of claim as defense. *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 346 (Ct. App. 1994).
 - (4) Substantial compliance is sufficient. *See, e.g., Townsend v. Neenah Joint Sch. Dist.*, 2014 WI App 117, ¶ 23, 358 Wis. 2d 618.
- b. Content of claim
- (1) Claim must include the following:
 - (a) Claimant's address (attorney's address substantially complies with notice-of-claim statutory requirement but not notice-of-disallowance requirements). [Wis. Stat.](#) § 893.80(1d)(b); *Novak v. City of Delavan*, 31 Wis. 2d 200, 210–11 (1966).
 - (b) Allegation of acts occurring within 120-day limit in [Wis. Stat.](#) § 893.80(1d)(a). *Probst v. Winnebago Cnty.*, 225 Wis. 2d 753, 757 (Ct. App. 1999).

- (c) Itemized statement of relief sought. [Wis. Stat.](#) § 893.80(1d)(b).
 - (i) Claim statute implicitly requires specific dollar amount. *Gutter*, 103 Wis. 2d at 9.
 - (ii) Claim exceeding statutory limit has been held valid. *Schwartz v. City of Milwaukee*, 43 Wis. 2d 119, 124 (1969).

(2) Claims have been held defective because of the following:

- (a) No dollar amount was stated. *Sambis v. Nowak*, 47 Wis. 2d 158, 166 (1970).
- (b) Claim was made for “up to \$50,000.” *Colburn v. Ozaukee Cnty.*, 39 Wis. 2d 231, 237–39 (1968).
- (c) Claim was made for amount “not exceeding \$25,000.” *Pattermann v. City of Whitewater*, 32 Wis. 2d 350 (1966).
- (d) Claim was made for amount “in excess of \$25,000.” *Gutter*, 103 Wis. 2d at 12–13.

NOTE: The claimant must state specific facts surrounding the circumstances of the event giving rise to the injury and demand for his or her relief, not just list the causes of action. *Rubedor v. Kopp*, No. 2009AP3133, 2011 WL 1587120 (Wis. Ct. App. Apr. 28, 2011) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

- c. According to [Wis. Stat.](#) § 893.80(1d)(b), file claim with
 - (1) Appropriate clerk for defendant,
 - (2) Person performing duty of clerk for defendant, or
 - (3) Secretary of defendant.

4. Disallowance of claim. [Wis. Stat.](#) § 893.80(1d)(b).

- a. Defendant must personally serve notice of disallowance on the claimant by registered or certified mail with restricted delivery. [Wis. Stat.](#) § 893.80(1g); *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 20, 300 Wis. 2d 74.

CAUTION: Serving disallowance of a claim on the claimant’s attorney is insufficient. *Cary v. City of Madison*, 203 Wis. 2d 261, 264 (Ct. App. 1996).

NOTE: The notice of disallowance is considered served when a certified letter is returned if claimant has left no forwarding address; service on the attorney is not required. *Williams v. City of Milwaukee*, No. 86-2074, 1987 WL 44998 (Wis. Ct. App. Dec. 18, 1987) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

- b. Defendant's failure to give notice within 120 days after presentation is disallowance. [Wis. Stat.](#) § 893.80(1g).
- c. Filing action within 120 days after filing claim, when governmental body does not serve notice of disallowance, is premature and does not constitute commencement of action that would toll statute of limitation. *Colby v. Columbia Cnty.*, 202 Wis. 2d 342, 362 (1996).

NOTE: [Wis. Stat.](#) § 893.80 does not impose specific duties or standards on the municipality in evaluating claims; therefore, conspiracy claims will not lie against the municipality. *Wagner v. Dissing*, 141 Wis. 2d 931, 937–38 (Ct. App. 1987).

5. Limitation of actions

- a. No action on a claim may be brought against defendant after six months from date of serving notice of disallowance. [Wis. Stat.](#) § 893.80(1g).

[Wis. Stat.](#) § 893.80(1g) does not violate Equal Protection Clause. *Griffin v. Milwaukee Transp. Servs., Inc.*, 2001 WI App 125, ¶ 13, 246 Wis. 2d 433.

- b. Six-month limitation period is not triggered when governmental body does not serve notice of disallowance. *Linstrom v. Christianson*, 161 Wis. 2d 635, 642–43 (Ct. App. 1991).
- c. Six-month limitation period runs from second notice of claim when first notice is a nullity. *Smith v. Milwaukee Cnty.*, 149 Wis. 2d 934, 940 (1989).
- d. Premature filing of suit, later dismissed without prejudice, tolls statute of limitation during its pendency pursuant to [Wis. Stat.](#) § 893.13(2). *Colby v. Columbia Cnty.*, 192 Wis. 2d 397 (Ct. App. 1995), *aff'd*, 202 Wis. 2d 342 (1996).

6. Specific actions

- a. Damages caused by accumulation of snow or ice; liability of city, village, town, and county. [Wis. Stat.](#) § 893.83(1).
 - (1) Cannot maintain a cause of action against a city, village, town, or county that arises out of damages caused by accumulation of snow or ice on any bridge or highway unless the accumulation existed for three weeks. Statute gives municipalities “three-week period of absolute immunity.” *Knoke v. City of Monroe*, 2021 WI App 6, ¶ 25, 395 Wis. 2d 551.
 - (2) Claim procedures of [Wis. Stat.](#) § 893.80 apply to claim for damages caused by accumulation of snow or ice.
- b. Injury by operation of governmental vehicles
 - (1) Claim procedures of [Wis. Stat.](#) § 893.80 apply to claim for damages caused by negligent operation of municipal motor vehicle. [Wis. Stat.](#) § 345.05(3).
 - (2) Claim procedures apply when suing municipal employee. *Gonzalez v. Teskey*, 160 Wis. 2d 1, 10 (Ct. App. 1990).

- (3) Motor grader plowing snow is not a motor vehicle. *Schanke v. Wisconsin Cnty. Mut. Ins. Corp.*, 177 Wis. 2d 746, 754 (Ct. App. 1993).
- c. Civil rights actions
- (1) Notice and claim procedures do not apply to civil rights actions. *Felder v. Casey*, 487 U.S. 131 (1988), *on remand*, 146 Wis. 2d 354 (1988), *later proceeding*, 150 Wis. 2d 458 (1989).
 - (2) See section [11.17](#), *infra*, for governmental immunities in civil rights actions.
- d. Negligent inspection
- Only one action may be brought by two or more joint tenants of single-family dwelling. [Wis. Stat.](#) § 893.80(1t).
- e. Class actions
- Under *Carpenter v. Commissioner of Public Works*, 115 Wis. 2d 211, 216 (Ct. App. 1983), notice of claim must, at a minimum,
- (1) Identify all claimants in class, and
 - (2) Show that claims are being made by their authority.
- f. Wage and hour claims against governmental subdivisions made under [Wis. Stat.](#) § 109.03. *Gilbertson v. City of Sheboygan*, 165 F. Supp. 3d 742 (E.D. Wis. 2016).

B. Claims Against State Employees [§ 11.398]

1. Applicability

- a. Applies to damage or injury caused by any state officer, employee, or agent. [Wis. Stat.](#) § 893.82(3).
 - (1) A Minnesota state employee performing services for Wisconsin pursuant to a valid state agreement is considered an employee of Wisconsin for the purposes of [Wis. Stat.](#) § 893.82. [Wis. Stat.](#) § 893.82(9).
 - (2) A state-university faculty physician is a state employee; [Wis. Stat.](#) § 893.82(3) applies to malpractice claims. *Mannino v. Davenport*, 99 Wis. 2d 602 (1981).
 - (3) The claimant must comply strictly with the requirements of [Wis. Stat.](#) § 893.82 to bring an action against a state officer, employee, or agent. [Wis. Stat.](#) § 893.82(2m).
 - (4) “Agent” of the state may be interpreted differently than an “agent” of a municipality under [Wis. Stat.](#) § 893.80. For purposes of [Wis. Stat.](#) § 893.82, the necessary elements of a principal-agent relationship are (1) “the express or implied manifestation of one party that the other party shall act for him [or her]”; (2) “[the

principal] has retained the right to control the details of the work”; and (3) “the party agreeing to perform the service is engaged in a distinct occupation or business from that of the person who engages the services.” See *Smith v. Wisconsin Physicians Servs.*, 152 Wis. 2d 25 (Ct. App. 1989); *Thorsland v. Wolter*, No. 2016AP91, 2016 WL 5923281 (Wis. Ct. App. Oct. 12, 2016) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); see also *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, 350 Wis. 2d 509 (discussing claims pursuant to [Wis. Stat.](#) § 893.80).

(5) Failure to comply with notice-of-claim requirement did not support granting of motion to dismiss in defamation case in which reasonable inference could not be drawn from complaint’s allegations that defendant’s alleged defamatory statements grew out of defendant’s duties of state employment. *Niesen v. Orwin*, No. 2021AP960, 2022 WL 319958 (Wis. Ct. App. Feb. 3, 2022) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (distinguishing *Ibrahim v. Samore*, 118 Wis. 2d 720 (1984)).

- b. [Wis. Stat.](#) § 893.82 does not apply to actions commenced under [Wis. Stat.](#) § 19.37 or 19.97. [Wis. Stat.](#) § 893.82(8).
- c. See [Wis. Stat.](#) § 893.82(4) for notice requirements for actions based on contribution or indemnification.
- d. See section [11.3](#), *supra*, for claims against governmental subdivisions.
- e. See section [11.17](#), *infra*, for governmental immunities.

2. Notice requirements

a. In general

(1) Requirement of notice is condition precedent to right to maintain an action. *Ibrahim*, 118 Wis. 2d 720; *cf. Niesen*, 2022 WL 319958, ¶ 16 (distinguishing *Ibrahim*; “the complaint itself does not reasonably raise the inference that the notice of claim statute, including its corresponding requirement that Niesen plead compliance with that statute as a condition precedent to his suit, applies in this case.”).

NOTE: Compliance with notice requirements must be pleaded to state a claim. *Yotvat v. Roth*, 95 Wis. 2d 357, 360 (Ct. App. 1980).

- (2) Purpose of notice requirement is to allow attorney general to investigate fresh claims. *Ibrahim*, 118 Wis. 2d 720.
- (3) Notice requirements apply to claims based on contribution and indemnification. *Protic v. Castle Co.*, 132 Wis. 2d 364 (Ct. App. 1986), *abrogated on other grounds by Bicknese v. Sutula*, 2003 WI 31, 260 Wis. 2d 31.

b. Contents

[Wis. Stat.](#) § 893.82(3) requires that written notice, with respect to event giving rise to claim, must contain

(1) Time,

NOTE: Exact time of event is required only when possible to provide it. *Mayo v. Boyd*, 2014 WI App 37, 353 Wis. 2d 162.

(2) Date,

(3) Location,

(4) Circumstances, and

(5) Names of persons involved.

(a) Name of negligent state employee is necessary to comply with statute. *Estate of Radley v. Ives*, No. 2006AP971, 2006 WL 3842180 (Wis. Ct. App. Dec. 28, 2006) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *Wood v. Anacker*, No. 2005AP237, 2005 WL 1529576, ¶ 2 (Wis. Ct. App. June 30, 2005) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

(b) Strict compliance is necessary. [Wis. Stat.](#) § 893.82(2m).

c. Filing requirements

(1) Notice must be

(a) Sworn to by claimant (this requirement is strictly construed), requiring (1) an oath or affirmation as to the truthfulness of the contents of the notice, and (2) a statement showing the oath or affirmation occurred before a notary. [Wis. Stat.](#) § 893.82(5); *Kellner v. Christian*, 197 Wis. 2d 183, 195 (1995).

NOTE: The Wisconsin Supreme Court has “urged” claimants to file a notice of claim using a jurat in which the notary sets forth that the notice was “sworn to” or affirmed before the notary. *Estate of Hopgood v. Boyd*, 2013 WI 1, ¶ 53, 345 Wis. 2d 65.

(b) Served on attorney general by certified mail (using regular mail does not comply with statute) or at the Department of Justice by personal service. [Wis. Stat.](#) § 893.82(5); *Kelly v. Reyes*, 168 Wis. 2d 743, 747 (Ct. App. 1992).

NOTE: Notice is properly served if the claimant sends the notice by certified mail, addressed to the attorney general at his or her capitol office, Main Street office, or post office box, or any combination of those three addresses, so long as all other requirements of the notice are met. *Hines v. Resnick*, 2011 WI App 163, 338 Wis. 2d 190. Personal service is now permitted as well, avoiding outcomes such as that in *Sorenson v. Batchelder*, 2016 WI 34, ¶¶ 2–3, 39, 368 Wis. 2d 140. [Wis. Stat.](#) § 893.82(5).

(c) Served within 120 days after injury, damage, or death, or for medical malpractice claims, served within the applicable time periods under [Wis. Stat.](#) §§ 893.55(1m), (2), and (3) and 893.56. [Wis. Stat.](#) § 893.82(5m).

- (2) Period in which notice must be given runs from event causing injury, regardless of when discovered. *Weis v. Board of Regents*, 837 F. Supp. 2d 971, 979 (E.D. Wis. 2011).

NOTE: Strict compliance is necessary for all aspects of notice under this claim. Failure to comply is a defense that cannot be waived. *Maple Grove Country Club Inc. v. Maple Grove Ests. Sanitary Dist.*, 2019 WI 43, ¶ 33, 386 Wis. 2d 425 (citing *Mannino v. Davenport*, 99 Wis. 2d 602, 612 (1981)).

C. Medical Malpractice Claims [§ 11.399]

1. Applicability of [Wis. Stat.](#) ch. 655
 - a. [Wis. Stat.](#) §§ 655.001(8), 655.002(1), (2) apply for patients' claims against
 - (1) Medical or osteopathic physicians;
 - (2) Nurse anesthetists;
 - (3) Operational cooperative sickness-care plans under [Wis. Stat.](#) §§ 185.981–985;
 - (4) Ambulatory surgery centers;
 - (5) Hospitals and certain affiliated organizations;
 - (6) Certain nursing homes;
 - (7) Certain medical corporations, partnerships, or other organizations or enterprises; and
 - (8) Employees of health-care providers.
 - b. Not applicable to claims against health-care providers for intentional crimes. [Wis. Stat.](#) § 655.27(1).
 - c. Not applicable to third-party claims based on contract when no bodily injury is alleged. *Northwest Gen. Hosp. v. Yee*, 115 Wis. 2d 59, 66 (1983).
 - d. Not applicable to claims against community-based residential facilities (CBRFs). *Estate of Oros v. Divine Savior Healthcare Inc.*, 2021 WI App 8, ¶ 22, 395 Wis. 2d 676, *aff'd sub nom. Andruss v. Divine Savior Healthcare Inc.*, 2022 WI 27, ___ Wis. 2d ___.
 - e. Plaintiff must join health-care provider in suit against non-provider employee such as a physician assistant. *Kennedy v. Gander*, No. 2020AP218, 2021 WL 126603, ¶ 35 (Wis. Ct. App. Jan. 14, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review denied).
2. Filing request for mediation
 - a. Follow form in [Wis. Stat.](#) § 655.44 or 655.445.

- b. Do not specify desired recovery amount. [Wis. Stat.](#) § 655.009(1).
3. Limitation of actions—general limitation in [Wis. Stat.](#) § 893.55

D. Worker's Compensation Claims [§ 11.400]

1. Notice of injury
 - a. Under [Wis. Stat.](#) § 102.12, no claim allowed unless employer has actual notice within 30 days after
 - (1) Occurrence of injury, or
 - (2) Date employee should have discovered nature of injury.
 - b. Absence of notice no bar to recovery if employer was not misled. [Wis. Stat.](#) § 102.12.
2. Limitation of actions
 - a. Under [Wis. Stat.](#) § 102.12, right to compensation is barred if no application is filed within two years after
 - (1) Date of injury or death, or
 - (2) Date employee or dependent should have discovered nature of injury.
 - b. Right to compensation not barred if employer knew or should have known of injury. [Wis. Stat.](#) § 102.12.
 - c. Under [Wis. Stat.](#) § 102.17(6), two-year limitation may be extended if employee is
 - (1) Under 18 years of age (extended to 1 year after attaining age of 18 years),
 - (2) Insane (extended to 2 years after limitation would otherwise expire), or
 - (3) On active duty in armed forces (extended to 2 years after limitation would otherwise expire).

E. Challenges to Constitutionality of Wisconsin Statutes [§ 11.401]

1. “In an action in which a statute is alleged to be unconstitutional, or to be in violation of or preempted by federal law, or if the construction or validity of a statute is otherwise challenged, the attorney general shall be served with a copy of the proceeding and is entitled to be heard.” [Wis. Stat.](#) § 893.825(1).
2. “In an action in which a statute is alleged to be unconstitutional, or to be in violation of or preempted by federal law, or if the construction or validity of a statute is otherwise challenged, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the joint committee on legislative organization are entitled to be heard.” [Wis. Stat.](#) § 893.825(2).

III. LIMITATION OF LIABILITY [§ 11.402]

A. Governmental Liability [§ 11.403]

Sovereign immunity bars suit against the state of Wisconsin unless the legislature has clearly and expressly consented to be sued. If a statute authorizes a claim to be brought against a state agency, the claim must be brought against that state agency. The state is not a proper party to the action. *Hoops Enters., III, LLC v. Super W., Inc.*, 2013 WI App 7, ¶ 7, 345 Wis. 2d 733.

1. Claims against governmental subdivisions

a. General limitation

(1) Recovery by any person limited to \$50,000. [Wis. Stat.](#) § 893.80(3).

- (a) Husband's loss-of-consortium claim is distinct cause of action and carries its own statutory limitation. *Schwartz v. City of Milwaukee*, 54 Wis. 2d 286 (1972).
- (b) Joint tenants may each recover statutory limit. *Wood v. Milin*, 134 Wis. 2d 279, 285 (1986).

NOTE: Only one action for property damage may be brought by two or more joint tenants of a single-family dwelling under [Wis. Stat.](#) § 893.80(1p) for negligent inspection of property. [Wis. Stat.](#) § 893.80(1t).

- (c) Each child in wrongful death action may recover statutory limit. *Boles v. Milwaukee Cnty.*, 150 Wis. 2d 801, 815 (Ct. App. 1989).
- (d) Injured party and injured party's subrogated medical carrier may not recover separately. *Wilmot v. Racine Cnty.*, 136 Wis. 2d 57, 64 (1987).
- (e) Recovery limited to \$50,000 from joint fire department formed by three municipalities. *Selzler v. Dresser Fire Dep't*, 141 Wis. 2d 465 (Ct. App. 1987).
- (f) Recovery limited to \$25,000 against volunteer fire company. [Wis. Stat.](#) § 893.80(3).

(2) Waiver of limitation

- (a) Recovery limitation may be waived by municipal insurance policy. *Stanhope v. Brown Cnty.*, 90 Wis. 2d 823, 852 (1979).
- (b) For waiver to occur, insurance policy must expressly so state. *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 132 (1987).
- (c) Limitation is not an affirmative defense and is not waived if not raised in an answer, during trial, or in a postverdict motion. *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 33 (1997).

- (3) Limit applies to individual employees as well as governmental entity. *Keefe v. State Farm Fire & Cas. Co.*, 127 Wis. 2d 41, 44 (Ct. App. 1985).
- b. Punitive damages
 - (1) Punitive damages may not be recovered. [Wis. Stat.](#) § 893.80(3).
 - (2) Municipality is immune from punitive damages under 42 [U.S.C.](#) § 1983. *City of Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981).
 - c. Limitations for specific actions
 - (1) Motor vehicle accidents: Recovery under [Wis. Stat.](#) § 893.80(3) is limited to \$250,000. [Wis. Stat.](#) § 345.05(3).

NOTE: \$250,000 limit does not prevent access to underinsured motorist coverage under claimant's own insurance policy. *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, 358 Wis. 2d 379.

NOTE: A *Pierringer* settlement with the primarily liable tortfeasor extinguishes claims against a municipality. *Van Cleve v. City of Marinette*, 2003 WI 2, ¶ 5, 258 Wis. 2d 80; see *Pierringer v. Hoyer*, 21 Wis. 2d 182, 193 (1963).
 - (2) Municipal landfill activities: Landfill official is immune from prosecution for good-faith actions within scope of duty. [Wis. Stat.](#) § 289.12(2).
 - (3) Civil rights actions
 - (a) Limitation on compensatory damages in [Wis. Stat.](#) § 893.80(3) does not apply to civil rights claims under 42 [U.S.C.](#) § 1983. *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 300 (1983).
 - (b) County is immune from vicarious liability in action under 42 [U.S.C.](#) § 1983 in which plaintiff alleged intentional tort by employee. *Voie v. Flood*, 589 F. Supp. 746 (W.D. Wis. 1984).
 - (4) Antitrust, see *infra* § [11.17](#).

2. Claims against state employees

- a. Recovery by any person or entity is limited to \$250,000. [Wis. Stat.](#) § 893.82(6).
- b. Punitive damages may not be recovered. [Wis. Stat.](#) § 893.82(6).

B. Landowner's Liability for Recreational Activities [§ 11.404]

1. In general

- a. [Wis. Stat.](#) § 895.52 should be liberally construed in favor of property owners. 1983 Wis. Act 418, § 1.

- b. [Wis. Stat.](#) § 895.52(2) provides that no property owner owes person entering land for recreational purposes a duty to
 - (1) Keep property safe for recreational purposes,
 - (2) Inspect property, or
 - (3) Warn of unsafe condition.
 - c. “[S]tatute confers immunity against the claims of a person who is injured while undisputedly on the property to supervise a child engaged in ‘recreational activity.’” *Wilmet v. Liberty Mut. Ins. Co.*, 2017 WI App 16, 374 Wis. 2d 413.
 - d. [Wis. Stat.](#) § 895.523 provides that no school districts, school boards, or governing bodies of charter schools, or officers, employees, and agents of such entities owe any person engaging or participating in recreational activity on school grounds held pursuant to a recreational agreement to
 - (1) Keep property safe for recreational purposes,
 - (2) Inspect property, or
 - (3) Warn of unsafe condition.
 - e. Recreational immunity applies to “agricultural tourism activities” for injuries occurring on or after April 18, 2014. [Wis. Stat.](#) §§ 895.524, 895.52(1)(g); 2013 Wis. Act 269.
 - f. Recreational immunity applies to “recreational aviation” on privately owned land for injuries occurring on or after April 18, 2014. [Wis. Stat.](#) § 895.52(1)(g); 2013 Wis. Act 318.
 - g. When a vendor is acting as a property owner’s agent for a festival, the vendor is entitled to recreational immunity under the property owner if the property owner has a right to control the vendor’s work. *Lang v. Lions Club of Cudahy Wis., Inc.*, 2020 WI 25, ¶ 59, 390 Wis. 2d 627.
2. Exceptions to the general rule of recreational immunity include the following:
- a. Under [Wis. Stat.](#) § 895.52(3), (4), property owned by state or governmental subdivision
 - (1) When owner charges spectator admission fee, or
 - (2) When death or injury caused by malicious act or malicious failure to warn against known unsafe condition.
 - b. Under [Wis. Stat.](#) § 895.52(5), property owned by nonprofit organization when death or injury caused by malicious act or malicious failure to warn against known unsafe condition.

- c. Under [Wis. Stat.](#) § 895.52(6), private property
- (1) When owner receives more than \$2,000 in money, goods, or services for land use;
 - (2) When death or injury caused by malicious act or malicious failure to warn against known unsafe condition;
 - (3) When injured person is owner's social guest and injury occurs on
 - (a) Platted land,
 - (b) Residential property, or
 - (c) Property within 300 feet of commercial or manufacturing structure; or
 - (4) When injured person is owner's employee.
- d. Under [Wis. Stat.](#) § 895.523, school districts, school boards, or governing boards of charter schools
- (1) When death or injury caused by malicious act or malicious failure to warn against known unsafe condition and occurs on the school grounds pursuant to recreational agreement designated for such recreational use;
 - (2) When death or injury to a spectator occurs on the school grounds designated for use pursuant to recreational agreement during the recreational activity; or
 - (3) When death or injury to a person participating in a recreational activity pursuant to a recreational agreement occurs (a) in a weight room, (b) in a swimming pool, or (c) on gymnastics equipment.
- e. Under [Wis. Stat.](#) § 895.529, possessors of real property may be liable for injury or death of a trespasser if all the following are true:
- (1) The possessor of real property maintained or allowed to exist an artificial condition on the property that was inherently dangerous to children.
 - (2) The possessor of real property knew or should have known that children trespassed on the property.
 - (3) The possessor of real property knew or should have known that the artificial condition maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children.
 - (4) The injured or killed child, because of his or her "youth or tender age," did not discover the condition or realize the risk involved in entering the property or in playing in close proximity to the inherently dangerous artificial condition.

- (5) The possessor of real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist.
3. Recreational participants have specific duties imposed by statute, the violation of which is negligence. [Wis. Stat.](#) § 895.525.
4. No duty of care or ground of liability is created under the common-law attractive-nuisance doctrine or [Wis. Stat.](#) § 895.52 toward any person who uses another's property for a recreational activity unless as expressly provided in [Wis. Stat.](#) § 895.52 or 895.529. [Wis. Stat.](#) § 895.52(7). Even if a person has permission from a property owner to use property, if the person is injured while engaging in a "recreational activity" on the property, [Wis. Stat.](#) § 895.52 bars liability to the property owner. *See Wahoske v. Hartford Fire Ins. Co.*, No. 2019AP2036, 2020 WL 4515931, ¶ 24 (Wis. Ct. App. Aug. 6, 2020) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied).
5. Social-host liability claim for common-law negligence not maintainable against social host who knew minors on property were consuming alcohol that social host did not provide, when one underage driver later allegedly caused alcohol-related accident. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, 308 Wis. 2d 17.

C. Medical Malpractice Recoveries [§ 11.405]

Noneconomic damages recoverable under [Wis. Stat.](#) ch. 655 are limited by [Wis. Stat.](#) § 893.55(4)(d), (f). [Wis. Stat.](#) § 655.017.

D. Mining-Related Injuries [§ 11.406]

1. Under [Wis. Stat.](#) § 107.31, recovery on claim against mining-damage appropriation is limited to:
 - a. \$150,000 for all injuries, reduced by
 - (1) Any amount otherwise recovered for injury. [Wis. Stat.](#) § 107.31(4)(a).
 - (2) Contributory negligence of claimant. [Wis. Stat.](#) § 107.31(3)(c).
 - b. \$20,000 for loss of society and companionship, pain, suffering, or mental anguish. [Wis. Stat.](#) § 107.31(4)(c).
 - c. In any event, nonpecuniary damages are limited to 50% of pecuniary damages. [Wis. Stat.](#) § 107.31(4)(c).
 - d. Amount equal to balance of mining-damage reserve accumulation. [Wis. Stat.](#) § 107.31(4)(e).
2. Punitive damages are not recoverable. [Wis. Stat.](#) § 107.31(4)(d).

E. Safety Inspections and Advisory Services [§ 11.407]

State officers, employees, agents, and insurers are generally not subject to civil liability for injury or loss occurring as result of any act or omission related to safety inspections and advisory services, but, under [Wis. Stat.](#) § 895.475,

1. State officer, employee, agent, or insurer may be liable if active negligence created condition causing injury; and
2. Insurer may be liable if such services are required under written service contract.

F. Parental Liability [§ 11.408]

1. Parent(s) liable for property damage or personal injury caused by willful, malicious, or wanton acts of unemancipated juvenile for up to \$5,000 plus costs and disbursements, unless liable under common law. [Wis. Stat.](#) § 895.035(4).
 - a. Maximum recovery for retail theft is not subject to \$5,000 limit. [Wis. Stat.](#) §§ 895.035(4), 943.51.
 - b. Maximum recovery by school board or governing body of private school for specified minor actions is \$20,000, plus costs, disbursements, and reasonable attorney fees. [Wis. Stat.](#) § 895.035(4a).
 - c. Provision does not apply to foster parents or placement agencies (see section [11.25](#), *infra*, for information on foster parent and agency immunities). 66 Wis. Op. Att’y Gen. 164 (1977).
2. [Wis. Stat.](#) § 895.035 does not limit amount recoverable from child, but award is reduced by amount recovered from parent(s). [Wis. Stat.](#) § 895.035(5).
3. See section [11.24](#), *infra*, for parental immunities.

G. Hotelkeeper’s Liability [§ 11.409]

1. Liability is limited to \$300 for articles accepted for safekeeping. [Wis. Stat.](#) § 97.633(3).
2. Under [Wis. Stat.](#) § 97.634, no liability unless
 - a. Articles delivered for safekeeping, or
 - b. Loss caused by hotel negligence.

H. Wrongful Death [§ 11.410]

1. [Wis. Stat.](#) § 895.04(4) provides that damages for loss of society and companionship—not to exceed \$500,000 per occurrence for a deceased minor or \$350,000 per occurrence for a deceased adult—may be awarded to any of the following:

- a. Spouse.

Estranged spouse receiving no financial support from decedent may be barred from

recovery in favor of surviving children. *Force v. American Fam. Mut. Ins. Co.*, 2014 WI 82, 356 Wis. 2d 582.

- b. Domestic partner under [Wis. Stat.](#) ch. 770. [Wis. Stat.](#) § 770.05.

NOTE: Domestic partnerships can no longer be formed after April 1, 2018. See 2017 Wis. Act 59, §§ 2225(f), 9452; [Wis. Stat.](#) §§ 770.05, 770.07.

- c. Children.
- d. Parents of the deceased.
- e. Siblings of the deceased, if they were minors at the time of death.
2. Punitive damages are not recoverable for wrongful death. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 316 (1980).
3. Estates may not recover damages for decedent's pecuniary loss. *Weiss v. Regent Props., Ltd.*, 118 Wis. 2d 225, 230 (1984).
4. Wrongful death statute applies only to deaths occurring in Wisconsin. *Waranka v. Wadena Ins. Co.*, 2014 WI 28, 353 Wis. 2d 619.
5. Although adult children cannot bring wrongful death claim against a health-care provider, see [Wis. Stat.](#) § 655.007; *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, 236 Wis. 2d 316, CBRF is not considered health-care provider under [Wis. Stat.](#) § 655.002, so adult children can bring a wrongful death claim against CBRF. *Estate of Oros v. Divine Savior Healthcare Inc.*, 2021 WI App 8, 395 Wis. 2d 676, *aff'd sub nom. Andruss v. Divine Savoir Healthcare Inc.*, 2022 WI 27, ___ Wis. 2d ___.

IV. IMMUNITIES [§ 11.411]

A. Governmental Acts Generally [§ 11.412]

1. In general
- a. Governmental subdivisions. [Wis. Stat.](#) § 893.80(4).
- (1) Governmental subdivisions are immune from liability for acts of officers, agents, and employees if
- (a) Act constitutes intentional tort; or
- (b) Act done in exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions, see *infra* §§ [11.18–20](#).
- (2) Immunity not limited to actions in tort; immunity may extend to actions seeking injunctive relief. *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 352 (Ct. App. 1996).

- (3) A municipal entity is not entitled to immunity when it fails to abate a continuing nuisance caused by negligent maintenance of a system or structure, after the municipality has notice of the nuisance. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, 350 Wis. 2d 554.
 - (4) To prove an intentional nuisance claim, the plaintiff must prove through sufficient evidence and facts that the governmental entity had actual knowledge of the nuisance and knowledge that the nuisance was causing damage or injuries. *Coolidge A L.L.C. v. City of Waukesha*, No. 2018AP1441, 2020 WL 3443521, ¶¶ 26–27 (Wis. Ct. App. June 24, 2020) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
 - (5) Governmental units may be held liable for employee’s negligence under respondeat superior doctrine. *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 49 (1984).
 - (6) Governmental units may be liable for employee’s negligence when employee is personally immune from liability. *Maynard v. City of Madison*, 101 Wis. 2d 273 (Ct. App. 1981), *abrogated on other grounds by Sheridan v. City of Janesville*, 164 Wis. 2d 420, 428 n.1 (Ct. App. 1991).
 - (7) Immunity is applicable to claims involving damages caused by accumulation of snow or ice; liability of city, village, town, and county. [Wis. Stat.](#) § 893.83. The plain language of [Wis. Stat.](#) § 893.83 permits the municipality to rely on discretionary immunity even after the three-week period. *Knoke v. City of Monroe*, 2021 WI App 6, 395 Wis. 2d 551.
- b. Governmental officers, agents, and employees are immune from liability for
- (1) Acts that are legislative, quasi-legislative, judicial, and quasi-judicial. [Wis. Stat.](#) § 893.80(4).

NOTE: Discretionary immunity may be waived by omission. *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 34 (1997).
 - (2) Acts performed within scope of official authority, unless act is negligent performance of purely ministerial duty. *Lister v. Board of Regents*, 72 Wis. 2d 282, 300–01 (1976).

NOTE: The failure to exercise ordinary care in the performance of a discretionary act does not put the act beyond the scope of authority. *Maynard*, 101 Wis. 2d at 282.
2. Ministerial duties
- a. A ministerial duty must be an act of government, such as a directive or plan prepared by a governmental unit or a contract under which the governmental unit undertook certain obligations. *Meyers v. Schultz*, 2004 WI App 234, ¶ 19, 277 Wis. 2d 845.
 - b. Officer is liable for negligent performance of ministerial act. *Pavlik v. Kinsey*, 81 Wis. 2d 42, 50 (1977).
 - c. Police officer who breached police department rule regarding nondisclosure of confidential information was not protected by immunity under [Wis. Stat.](#) § 893.80(4)

because nondisclosure was ministerial duty. *Doe v. Saftig*, No. 09-C-1176, 2011 WL 1792967 (E.D. Wis. May 11, 2011) (unpublished).

- d. Duty is ministerial only when absolute, certain, and imperative, involving mere performance of specific task when law imposes, prescribes, and defines time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion. *Lister*, 72 Wis. 2d at 301.
- e. Ministerial duty existed to place warning sign on dangerous trail in park under the known-danger exception to the immunity rule. *Cords v. Anderson*, 80 Wis. 2d 525, 541 (1977).
- f. Duty of officers to drive with “due regard under the circumstances” even when responding to an emergency is ministerial. *Legue v. City of Racine*, 2014 WI 92, 357 Wis. 2d 250.
- g. Failure to follow first-responder handbook by evacuating neighborhood in face of known danger of gas leak was a ministerial duty. *Oden v. City of Milwaukee*, 2015 WI App 29, 361 Wis. 2d 708.
- h. No ministerial duty existed to take protective measures or warn about sharp edges on a school volleyball net under the known-danger exception to the immunity rule. *Schilling v. Sheboygan Area Sch. Dist.*, No. 2004AP3171, 2005 WL 2372725 (Wis. Ct. App. Sept. 28, 2005) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
- i. No ministerial duty exists to warn about a nine-foot-high stadium platform that lacked safety railing under the known-danger exception to the immunity rule. *Umansky v. ABC Ins. Co.*, 2008 WI App 101, 313 Wis. 2d 445, *aff’d and remanded*, 2009 WI 82, 319 Wis. 2d 622.
- j. No ministerial duty existed to protect student from verbal harassment that led to physical assault when numerous courses of action were available to public officer. *Blaney v. Employers Mut. Cas. Co.*, No. 2005AP2276, 2006 WL 910379, ¶ 9 (Wis. Ct. App. Apr. 11, 2006) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
- k. No ministerial duty created by cheerleader rule book to provide spotter for cheerleading. *Noffke v. Bakke*, 2009 WI 10, 315 Wis. 2d 350.
- l. Duty imposed by safe-place statute ([Wis. Stat.](#) § 101.11) is not ministerial. *Spencer v. County of Brown*, 215 Wis. 2d 641, 651–52 (Ct. App. 1997).
- m. Duty must be imposed by law (statutes, administrative rules, policies, or orders). *Meyers v. Schultz*, 2004 WI App 234, ¶ 19, 277 Wis. 2d 845.
- n. Student’s special education plan does not impose a ministerial duty that would except school from governmental immunity nor would violation of the plan create a known and compelling danger that would except school from governmental immunity. *Edwards v. Baraboo Sch. Dist.*, No. 2010AP2736, 2011 WL 3189409 (Wis. Ct. App. July 28, 2011) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).
- o. Immunity applied to claim of negligence in failing to protect against portable scoreboard falling on spectators at high school gymnasium. *Dargenio v. Community Ins. Corp.*, No.

2015AP809, 2016 WL 3619365 (Wis. Ct. App. July 7, 2016) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

- p. Known-danger exception applies and imposes a ministerial duty to monitor and give a swim test to a child (age nine years old) who drowned in a municipal pool while attending a summer camp sponsored by the municipality. *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶ 60, 385 Wis. 2d 86.
- q. Duty to report abuse of children to authorities under [Wis. Stat.](#) § 49.981 is ministerial and not discretionary. *Baumgardt v. Wausau Sch. Dist. Bd. of Ed.*, 475 F. Supp. 2d 800 (2007).

NOTE: The court of appeals in *Elmer* noted the current ministerial duty standard: a duty that is “absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or decision.” *Elmer v. Wisconsin Cnty. Mut. Ins. Co.*, No. 2009AP2815, 2011 WL 1648260, ¶ 17 n.11 (Wis. Ct. App. May 3, 2011) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (citing *C.L. v. Olson*, 143 Wis. 2d 701, 711–12 (1988)).

3. Intentional conduct

- a. Officer is liable, and municipality is immune from liability, for officer’s intentional tort. [Wis. Stat.](#) § 893.80(4).
- b. Action against city was barred when plaintiff alleged false imprisonment. *Nelson v. City of Milwaukee*, 57 Wis. 2d 166 (1973).
- c. City was immune from action for alleged assault and battery committed by police. *Salerno v. City of Racine*, 62 Wis. 2d 243 (1974).

4. Civil rights actions

- a. Municipality cannot be held liable under 42 [U.S.C.](#) § 1983 on respondeat superior theory. *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

NOTE: For a civil rights plaintiff to successfully sue a municipal entity under 42 [U.S.C.](#) § 1983, the plaintiff must show that the injury was caused by municipal policy or custom, irrespective of whether the remedy sought is money damages or prospective relief. *Los Angeles Cnty., Cal. v. Humphries*, 562 U.S. 29 (2010).

- b. Municipal liability exists in certain circumstances. *Starstead v. City of Superior*, 533 F. Supp. 1365, 1368 (W.D. Wis. 1982).

NOTE: A random, isolated event cannot constitute a “widespread” practice that would amount to a true municipal policy that would support a claim under 42 [U.S.C.](#) § 1983. *Bloodworth v. Village of Greendale*, No. 10-C-0273, 2011 WL 98835 (E.D. Wis. Jan. 12, 2011) (unpublished), *aff’d*, 475 F. App’x 92 (7th Cir. 2012).

NOTE: It is plausible that individual city employees are not liable while the city could be liable, if the customs and policies of the municipality were the cause of the violation of the plaintiff’s constitutional rights. *Ott v. City of Milwaukee*, No. 09-C-870, 2010 WL

5095305 (E.D. Wis. Dec. 8, 2010) (unpublished).

5. Antitrust actions

No damages, interest on damages, costs, or attorney fees under [Wis. Stat.](#) ch. 133 may be recovered from any local governmental unit, officer, or employee who acted in official capacity. [Wis. Stat.](#) § 133.18(1)(b). There is no statutory exemption to the notice of claim requirements under [Wis. Stat.](#) § 893.80 for antitrust actions under [Wis. Stat.](#) § 133.18. *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶ 39, 335 Wis. 2d 720.

6. COVID-19

[Wis. Stat.](#) § 895.476 establishes immunity from civil liability related to COVID-19.

- a. Covered entities include partnerships; corporations; associations; governmental entities; tribal governments; tribal entities; other legal entities; schools; institutions of higher education; nonprofit organizations; employers covered by the state unemployment insurance laws; and employers, business owners, employees, agents, or independent contractors of those entities.
- b. Covered entities are immune from civil liability for death or injury related to COVID-19, except for cases involving reckless, wanton, or intentional misconduct.
- c. The statute applies to lawsuits filed after February 27, 2021, for claims that accrued on or after March 1, 2020. *See* 2021 Wis. Act 4, § 9 (nonstatutory provisions).

B. Judicial Acts [§ 11.413]

1. Judges are immune for judicial acts within or in excess of their jurisdiction, even if acts are malicious or corrupt, unless there is clear absence of all jurisdiction. *Wickstrom v. Ebert*, 585 F. Supp. 924, 928 (E.D. Wis. 1984).
2. Doctrine of judicial immunity does not bar injunctive relief. *Harris v. Harvey*, 605 F.2d 330, 335 (7th Cir. 1979).

C. Quasi-Judicial Acts [§ 11.414]

1. Quasi-judicial act involves
 - a. Exercise of discretion or judgment in applying a rule to specific facts, *Maynard v. City of Madison*, 101 Wis. 2d 273, 282 (Ct. App. 1981), *abrogated on other grounds by Sheridan v. City of Janesville*, 164 Wis. 2d 420, 428 n.1 (Ct. App. 1991); or
 - b. Under *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 683 (1980), essentially judicial procedures such as
 - (1) Notice,
 - (2) Hearing,

- (3) Exercise of discretion, and
 - (4) Decision on the record.
2. Examples of quasi-judicial acts include the following:
 - a. Removal of police officer from duty. *Salerno v. City of Racine*, 62 Wis. 2d 243 (1974).
 - b. Issuance of permits by municipal corporation. *Allstate Ins. Co. v. Metropolitan Sewerage Comm'n*, 80 Wis. 2d 10 (1977).
 - c. Decision of coroner whether to conduct or order autopsy. *Scarpaci*, 96 Wis. 2d at 683.
 - d. Decision of state road-test examiner to issue driver's license. *Lifer v. Raymond*, 80 Wis. 2d 503 (1977).

D. Legislative and Quasi-Legislative Acts [§ 11.415]

1. Legislative and quasi-legislative acts include the following:
 - a. Decision to erect highway warning signs. *Weiss v. City of Milwaukee*, 79 Wis. 2d 213 (1977).
 - b. Decision to acquire existing dam or construct new dam. *Lange v. Town of Norway*, 77 Wis. 2d 313, 318 (1977).
2. Officer making legislative or quasi-legislative decision may be liable for breach of ministerial duty imposed by that decision. *Pavlik v. Kinsey*, 81 Wis. 2d 42, 50–51 (1977).

E. Prosecutorial Acts [§ 11.416]

1. Public prosecutor acting in official capacity is absolutely privileged to initiate or continue criminal proceedings. *Bromund v. Holt*, 24 Wis. 2d 336, 341 (1964).
2. Absolute immunity is confined to quasi-judicial functions when prosecutor acts as advocate—investigative and administrative functions receive only qualified immunity. *Wickstrom v. Ebert*, 585 F. Supp. 924, 930–31 (E.D. Wis. 1984).
3. Immunity only applies when prosecutor is initiating prosecution and presenting the state's case. *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979).

F. Acts by Attorneys [§ 11.417]

1. Immunity from liability extends to attorney who pursues client's interests in good faith on matter fairly debatable in law. *Strid v. Converse*, 111 Wis. 2d 418, 429 (1983).
2. Immunity does not apply to malicious, fraudulent, or tortious acts. *Id.*
3. Guardian ad litem has quasi-judicial immunity from negligence claims stemming from performance of statutory duties. *Paige K.B. v. Molepske*, 219 Wis. 2d 418, 435 (1998).

4. Guardian ad litem is not a governmental employee and thus cannot be subject to claim under 42 [U.S.C.](#) § 1983. *Lane v. Milwaukee Cnty. Dep't of Soc. Servs.*, No. 10-CV-297-JPS, 2011 WL 5122615 (E.D. Wis. Oct. 28, 2011) (unpublished).

G. Acts by Witnesses [§ 11.418]

1. Absolute immunity applies during any stage in judicial process. *Wickstrom v. Ebert*, 585 F. Supp. 924, 932–34 (E.D. Wis. 1984).
2. Immunity from civil liability extends to damages caused by false and malicious testimony, if relevant to issues in matter for which testimony is given. *Bromund v. Holt*, 24 Wis. 2d 336, 341–42 (1964).

H. Acts by Parents [§ 11.419]

1. Under *Goller v. White*, 20 Wis. 2d 402, 413 (1963), immunity exists for negligent actions causing injury to children when act involves
 - a. Exercise of parental authority; or
 - b. Exercise of ordinary parental discretion with respect to providing food, clothing, housing, medical and dental services, and other care.
2. Immunity exists when
 - a. Act is performance of parent's legal duty or obligation. *Thoreson v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d 231 (1972).
 - b. Parents fail to properly instruct child concerning safety precautions. *Lemmen v. Servais*, 39 Wis. 2d 75, 79 (1968).
3. Immunity does not exist when
 - a. Child is injured in auto accident caused by parent's negligence. *Schmidt v. United States*, 369 F. Supp. 64, 67 (E.D. Wis. 1974).
 - b. Parents negligently supervised child's play. *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629 (1970).

I. Acts by Foster Parents and Foster Agencies [§ 11.420]

1. Under [Wis. Stat.](#) § 895.485(2), licensed foster parents are immune from civil liability for any act or omission of
 - a. Foster parent while acting in capacity as foster parent, and
 - b. Child while in care of foster parent.
2. Immunity in para. 1., *supra*, does not apply to

- a. Act or omission not done in good faith. [Wis. Stat.](#) § 895.485(3).
 - b. Act or omission not in compliance with written instructions of agency placing child. [Wis. Stat.](#) § 895.485(3).
 - c. Parental liability for damages caused by minor's use of fireworks if foster parent consents to use. [Wis. Stat.](#) § 895.485(2); *see* [Wis. Stat.](#) § 167.10(7).
 - d. Parental liability for damages caused by minor's negligence or willful misconduct in operating motor vehicle. [Wis. Stat.](#) § 895.485(2); *see* [Wis. Stat.](#) § 343.15(2).
3. Under [Wis. Stat.](#) § 895.485(4), agency placing child is immune from civil liability for act of agency, foster parent, or foster child unless
 - a. Agency failed to provide foster parent with required medical information relating to child, and
 - b. Bodily injury or property damage occurs directly from the act or omission.

J. Rendering Aid [§ 11.421]

1. Emergency care. [Wis. Stat.](#) § 895.48(1).
 - a. Certain individuals who provide aid in emergencies are immune from civil liability.
 - b. Rule does not apply to health-care professionals rendering care for compensation.
2. Pupils
 - a. Under [Wis. Stat.](#) § 118.257, school administrator, principal, pupil-services professional, or teacher is not liable solely for
 - (1) Referring pupil to law enforcement officers; or
 - (2) Removing pupil from school premises or activity for suspicion of possession, distribution, or consumption of alcohol or controlled substance.
 - b. Designated personnel are immune from civil liability for acts or omissions in rendering emergency care to pupils; tribal school personnel are immune from civil liability for administering nonprescription drugs only if the school authority has adopted a written policy that complies with [Wis. Stat.](#) § 118.29(4). [Wis. Stat.](#) § 118.29(3), (4m).
 - c. Designated personnel are immune from civil liability for good-faith attempts to prevent pupil suicide. [Wis. Stat.](#) § 118.295
3. Under [Wis. Stat.](#) § 51.15(11), law enforcement officers and persons authorized to take a child into custody under [Wis. Stat.](#) ch. 48 or a juvenile into custody under [Wis. Stat.](#) ch. 938 are immune for good-faith detention of certain persons believed to be

- a. Mentally ill, [Wis. Stat.](#) § 51.15(1)(ag)1.;
 - b. Drug dependent; or
 - c. Developmentally disabled.
4. Disaster relief. [Wis. Stat.](#) § 323.45.

No person providing equipment, materials, facilities, labor, or services is liable for personal or property injury if acting

- a. Under direction of governor or other entity designated under [Wis. Stat.](#) § 323.45; and
- b. In response to enemy action, a disaster, or a federally declared state of emergency, or during a state of emergency declared by the governor.

Exception: reckless, wanton, or intentional misconduct.

- 5. Aid to crime victims: Any person providing reasonable assistance is immune from civil liability for acts or omissions in providing assistance unless person expects or receives compensation. [Wis. Stat.](#) § 940.34(3).
- 6. Abused or neglected children or abused unborn children: Any person, in good faith, reporting, investigating, taking photographs, or medically examining a child or expectant mother when abuse or neglect is suspected is immune from any liability, civil or criminal. [Wis. Stat.](#) § 48.981(4).
- 7. Sexual exploitation by therapist: Any person or institution participating in reporting sexual exploitation by therapist is immune from all liability if done in good faith. [Wis. Stat.](#) § 940.22.
- 8. Hazardous-substance predictor: Any hazardous-substance predictor or person who supplies technology for that purpose is immune for good-faith acts or omissions. [Wis. Stat.](#) § 895.4802(2).
- 9. Immunity from civil liability for forcibly entering a vehicle when a person believes in good faith that another person or domestic animal is in danger. [Wis. Stat.](#) § 895.484.
- 10. Certain entities and individuals are immune from liability for injury that results from administration of or failure to administer an epinephrine auto-injector or prefilled syringe. [Wis. Stat.](#) § 255.07(6).

K. Acts by Health-Care Professionals [§ 11.422]

- 1. Tests for intoxication: Any person withdrawing blood at request of traffic officer for determining presence of alcohol or controlled substance is immune from all liability unless act is negligently performed. [Wis. Stat.](#) § 895.53.
- 2. Natural death. [Wis. Stat.](#) § 154.07.

No physician or other designated person or facility may be held liable or charged with

unprofessional conduct for

- a. Withholding or withdrawing life-sustaining procedures or feeding tubes under [Wis. Stat. ch. 154](#),
 - b. Failing to act under revocation unless person has actual knowledge, or
 - c. Failing to comply with declaration in certain situations.
3. Blood or tissue transfer: No designated person or organization is liable for damages resulting from procuring, processing, distributing, or using human blood products or tissues for purposes of injection, transfusion, or transplantation, except for negligence or willful misconduct. [Wis. Stat. § 146.31](#).

L. Landlords [§ 11.423]

Under [Wis. Stat. § 893.34](#), no suit may be brought against property owner for good-faith termination of tenancy after receiving notice from law enforcement under [Wis. Stat. § 704.17\(1\)\(c\), \(2\)\(c\), or \(3\)\(b\)](#).

M. Other [§ 11.424]

1. Persons with permits to place buoys in waterways are immune from civil liability for placement or nonplacement of buoys or markers, effective November 13, 2015. [Wis. Stat. § 895.528](#); 2015 Wis. Act 91.
2. Equine activities
 - a. An equine activity sponsor or equine professional is immune from suit for injuries and death caused by the inherent risks of equine activity. [Wis. Stat. § 895.481](#).
 - b. Equine immunity extends to equine-assisted learning and psychotherapy as of November 13, 2015. [Wis. Stat. § 895.481\(1\)\(b\)5d., 5r.](#); 2015 Wis. Act 66.
3. Members of a ski patrol are immune from suit while exercising their duties. [Wis. Stat. § 895.482](#).
4. Employers are immune from suit for certain acts or omissions of some employees. “An employer who hires an employee who has been issued a certificate of qualification for employment under s. 973.25 is immune from liability for the intentional acts or omissions of the employee, acts of the employee that are outside of the course of the employee’s employment, and in any proceeding on a claim against the employer for negligent hiring, retention, training, or supervision of the employee unless the employer, when he or she hired the employee, acted maliciously towards the plaintiff or with intentional disregard of the rights of the plaintiff.” [Wis. Stat. § 895.492](#).
5. Immunity for health-care providers during COVID-19 emergency. [Wis. Stat. § 895.4801](#).

Any health-care professional or provider is immune from civil liability for death or injury to an individual or damages caused by actions or omissions when all the following apply:

- a. The action or omission occurs while the individual is providing services during the state of emergency declared under [Wis. Stat. § 323.10](#) on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates.
- b. The action or omission does not involve reckless or wanton conduct or intentional misconduct.
- c. The action or omission relates to a health service that is provided or not provided in good faith and is consistent with any of the following:
 - (1) “Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency...”; or
 - (2) “Any guidance published by the department of health services, the federal department of health and human services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.”

Chapter 12

Settlement and Subrogation

Richard L. Binder
Kyle G. Borkenhagen
Rohde Dales LLP
Sheboygan

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 191; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-102 (Mar. 15, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 16,092 (Mar. 21, 2022).

I. SETTLEMENT AGREEMENTS [§ 12.425]

A. In General [§ 12.426]

1. A settlement agreement is a contract and therefore requires “an offer, an acceptance and consideration all resulting from” a meeting of the minds. *American Nat’l Prop. & Cas. Co. v. Nersesian*, 2004 WI App 215, ¶ 16, 277 Wis. 2d 430.
2. Agreements to agree are unenforceable when there is no agreement as to material terms. *See Dunlop v. Laitsch*, 16 Wis. 2d 36, 42 (1962).

NOTE: Because agreements to agree are unenforceable, settlement agreements reached at mediation should be reduced to a writing explaining all material terms of the agreement that is signed by all

parties to the settlement agreement.

3. “To be enforceable, the material terms of the settlement must be addressed with a reasonable degree of certainty and definiteness.” *Paul R. Ponfil Tr. v. Charmoli Holdings, LLC*, 2019 WI App 56, ¶ 22, 389 Wis. 2d 88.

PRACTICE TIP: Whether writing a settlement agreement or release, verbal exactitude is required. If you intend to waive the right to an appeal, say so. *See generally Roberts Premier Design Corp. v. Adams*, 2021 WI App 52, 399 Wis. 2d 151. If you intend finality, say so. *See id.*

B. Writing Required While Litigation Pending [§ 12.427]

See [Wis. Stat.](#) § 807.05.

1. A settlement agreement relating to an action presently pending must be in writing, unless the agreement is put on the record in open court.
2. The writing must be subscribed to by the party or the party’s attorney to be bound.
3. [Wis. Stat.](#) § 807.05 “is an exception to the general rule that oral contracts are binding.” *Paul R. Ponfil Tr. v. Charmoli Holdings, LLC*, 2019 WI App 56, ¶ 15, 389 Wis. 2d 88.

C. Personal-Injury Actions [§ 12.428]

See [Wis. Stat.](#) § 757.38.

1. A settlement reached in a pending personal-injury action must be in writing and signed by the attorney for the plaintiff.
2. A settlement agreement in a pending personal-injury action signed only by the plaintiff may be unenforceable.
3. This rule does not apply to the settlement of personal-injury claims before the filing of a lawsuit.

CAUTION: Settling before filing an action must always be approved by a court if the case involves a minor or mentally incompetent person. *See, infra*, § [12.10](#)

II. STATUTORY OFFERS OF SETTLEMENT [§ 12.429]

A. In General [§ 12.430]

See [Wis. Stat.](#) § 807.01.

1. Purpose is to encourage settlement before trial. *DeMars v. LaPour*, 123 Wis. 2d 366 (1985).
2. Possible in any case in which a party demands judgment or setoff against another party; also applies to federal claims brought in state court. [Wis. Stat.](#) § 807.01(5); *Duello v. Board of Regents*, 220 Wis. 2d 554 (Ct. App. 1998).

3. Does not apply to interests in pending estates or cases resolved by arbitration. *Lane v. Williams*, 2000 WI App 263, ¶ 18, 240 Wis. 2d 255; *Gertsch v. International Equity Rsch. (In re Est. of Katze-Miller)*, 158 Wis. 2d 559, 584 (Ct. App. 1990).
4. Procedure applies to both liquidated and unliquidated claims. *Graves v. Travelers Ins. Co.*, 66 Wis. 2d 124 (1974).
5. Unaccepted offers cannot be used as evidence or mentioned during trial. [Wis. Stat.](#) §§ 807.01(1)–(3), 904.08.
6. Offeror may revoke offer any time before acceptance. *Sonnenburg v. Grohskopf*, 144 Wis. 2d 62, 64 (Ct. App. 1988).
7. Providing for withdrawal of the offer upon the expiration of the statutory acceptance period is not inconsistent with [Wis. Stat.](#) § 807.01. *Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co. (Upthegrove I)*, 146 Wis. 2d 470, 475 (Ct. App. 1988).

B. Requirements [§ 12.431]

See [Wis. Stat.](#) § 807.01.

1. Making offer:
 - a. Offer must be in writing and be reasonably clear on its face that it is made pursuant to [Wis. Stat.](#) § 807.01 (telephone offers are invalid). *Bauer v. Piper Indus., Inc.*, 154 Wis. 2d 758, 765–66 (Ct. App. 1990); *Sachsenmaier v. Mittlestadt*, 145 Wis. 2d 781, 792 (Ct. App. 1988).
 - b. Offer must be clear and unambiguous (i.e., free of intrinsic and extrinsic ambiguity); ambiguity is construed against drafter. Insurer owes a duty to its insured to clarify any ambiguity in the settlement offer it receives (e.g., whether offer applies to both insured and insurer). *Prosser v. Lueck*, 225 Wis. 2d 126, 141 (1999); *Stan's Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 576 (Ct. App. 1995).

NOTE: The pendency of dispositive motions does not make an offer ambiguous. *Mews v. Beaster*, 2005 WI App 53, ¶¶ 12–13, 279 Wis. 2d 507.

- c. Submit after issue is joined, but at least 20 days before trial.

NOTE: For patients' compensation claims, offer must be served 60 days after the prehearing conference and 20 days before the panel hearing.

- d. In multiple-plaintiff cases, submit separate offers to individual defendants. *DeMars v. LaPour*, 123 Wis. 2d 366 (1985); *Wilber v. Fuchs*, 158 Wis. 2d 158 (Ct. App. 1990); *White v. General Cas. Co.*, 118 Wis. 2d 433 (Ct. App. 1984).
 - e. Defendants who are jointly and severally liable may submit joint offers to individual plaintiff; however, joint offers by defendants who are only severally liable do not invoke the recovery-of-costs provisions of [Wis. Stat.](#) § 807.01(1). *Denil v. Integrity Mut. Ins. Co.*, 135 Wis. 2d 373, 380 (Ct. App. 1986).

- f. Plaintiff suing multiple defendants on multiple theories, at least one of which involves several liability, must submit separate offers of settlement so that each defendant has a fair opportunity to evaluate its potential individual liability; however, if multiple defendants are jointly and severally liable and covered by the same insurance policy, and the offer is within policy limits, a single offer is valid. *Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740 (1993); *Ritt v. Dental Care Assocs.*, 199 Wis. 2d 48, 76 (Ct. App. 1995); *Wilber*, 158 Wis. 2d at 163–65; *Smith v. Keller*, 151 Wis. 2d 264, 273–76 (Ct. App. 1989).
- g. In general, for an offer to be effective, offeree must be able to fully and fairly evaluate from an *individual* perspective. The evaluation must be possible when the offer is made or during the 10-day period during which a response must be made. To avoid ambiguity, offer must state whether subrogated claims are to be satisfied from settlement proceeds. If defendant is sued under a fee-shifting statute, the offer must state whether fees are included in the settlement amount. *Hadrian v. State Farm Mut. Auto. Ins. Co.*, 2008 WI App 188, ¶ 8, 315 Wis. 2d 529; *Pachowitz v. Ledoux*, 2003 WI App 120, ¶ 51, 265 Wis. 2d 631; *Stahler v. Beuthin*, 206 Wis. 2d 610, 625 (Ct. App. 1996); *Testa v. Farmers Ins. Exch.*, 164 Wis. 2d 296 (Ct. App. 1991); *see, e.g., Bockin v. Farmers Ins. Exch.*, 2006 WI App 220, 296 Wis. 2d 694; *see also Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 85, 318 Wis. 2d 148.

NOTE: If attorney fees are a part of settlement, they must be stated in a sum certain. A stated amount “plus reasonable attorney fees” is not a valid offer. *Bindl v. Next Level Commc'ns*, No. 2005AP630, 2005 WL 3543613 (Wis. Ct. App. Dec. 29, 2005) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

2. Accepting offer:

- a. Serve notice of acceptance, in writing, within 10 days after receipt. Time to respond is tolled if the action has been judicially stayed (e.g., for arbitration). *Briggs v. Farmers Ins. Exch.*, 2000 WI App 40, ¶¶ 13–17, 233 Wis. 2d 163.

NOTE: Acceptance is accomplished only by affirmative action.

- b. If offer is acceptable but contingent on terms not in the control of the offeree, offer should be accepted. If contingencies fail and case is tried, no double costs. *Knoche v. Wisconsin Mut. Ins. Co.*, 151 Wis. 2d 754, 758–59 (Ct. App. 1989).

C. Procedure [§ 12.432]

1. Offers by defendant to plaintiff

- a. Can offer to settle entire liability of defendant. [Wis. Stat.](#) § 807.01(1).

(1) Acceptance

- (a) Plaintiff may file offer and proof of service of notice of acceptance with clerk of court, and
- (b) Clerk of court must enter judgment accordingly.

(2) Consequences of nonacceptance

If offer is not accepted and plaintiff fails to win a more favorable judgment, defendant recovers costs based on demand of complaint. Costs allowable to defendant may be offset against plaintiff's award. *Hamdan v. Dawicki*, 2006 WI App 209, 296 Wis. 2d 623.

b. Can offer specified damages, contingent on finding of liability. [Wis. Stat.](#) § 807.01(2).

(1) Acceptance

(a) Either party may file proof of offer and acceptance.

(b) On finding of liability, court assesses damages accordingly.

(2) Consequences of nonacceptance

If offer is not accepted and damages assessed do not exceed offer, no party may recover costs.

2. Offers by plaintiff to defendant

a. [Wis. Stat.](#) § 807.01(3)—acceptance

Plaintiff may offer to accept sum of money, property, or particular relief, with costs, but failure to mention costs makes the offer ambiguous. *With costs* means in addition to damages. When the suit is based on a fee-shifting statute, *costs* include attorney fees unless otherwise stated (but should state amount of fees). When attorney fees are an item of damages (e.g., bad-faith cases), they are not included in the phrase “with costs,” but must be specifically mentioned in the offer. *Roehl Transp., Inc. v. Liberty Mut. Ins. Co.*, 2010 WI 49, ¶ 183, 325 Wis. 2d 56; *Stewart v. Farmers Ins. Grp.*, 2009 WI App 130, ¶ 14, 321 Wis. 2d 391; *Alberte v. Anew Health Care Servs., Inc.*, 2004 WI App 146, ¶ 6, 275 Wis. 2d 571; *Northridge Co. v. W.R. Grace & Co.*, 205 Wis. 2d 267, 289 (Ct. App. 1996); *Stahl v. Sentry Ins.*, 180 Wis. 2d 299, 308 (Ct. App. 1993).

NOTE: Offers should be tailored to the relief demanded in the action but must state with clarity what is necessary to settle the case; offers must be confined to remedies that the court can grant. *DeWitt, Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2004 WI 92, ¶ 42, 273 Wis. 2d 577; *Cue v. Carthage Coll.*, 179 Wis. 2d 175, 179 (Ct. App. 1993).

b. [Wis. Stat.](#) § 807.01(3) and (4)—consequences of nonacceptance

(1) If plaintiff's offer is not accepted and plaintiff recovers a more favorable judgment, plaintiff recovers double costs per [Wis. Stat.](#) § 807.01(3), plus interest per [Wis. Stat.](#) § 807.01(4), on the amount recovered from the party that refused offer. Interest is from date of offer to date of payment and is in lieu of interest computed under [Wis. Stat.](#) §§ 814.04(4) and 815.05(8) (enhanced interest is not stacked with legal rate or contract interest).

- (2) Interest is not computed on double costs; amount recovered does not include attorney fees awarded, except when plaintiff recovers under a fee-shifting statute (unless attorney fees are damages), and, one must obtain a judgment to trigger, but makes no difference whether judgment is obtained by trial or by stipulation. *Tomsen v. Secura Ins.*, 2003 WI App 187, ¶¶ 8, 9, 266 Wis. 2d 491; *Pachowitz v. Ledoux*, 2003 WI App 120, 265 Wis. 2d 631; *Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.*, 2002 WI App 138, 256 Wis. 2d 205; *Osman v. Phipps*, 2002 WI App 170, 256 Wis. 2d 589; *Blank v. USAA Prop. & Cas. Ins. Co.*, 200 Wis. 2d 270, 279–83 (Ct. App. 1996); *American Motorist Ins. Co. v. R&S Meats, Inc.*, 190 Wis. 2d 196, 214–15 (Ct. App. 1994); *Erickson v. Gundersen*, 183 Wis. 2d 106, 121–23 (Ct. App. 1994).
 - (3) Penalty interest may be payable by nonaccepting defendant who loses money, even if it is not in such defendant's possession (e.g., escrowed funds); generally, penalty interest may be assessed against nonaccepting party only on the portion of verdict for which that party is responsible; penalty interest is payable on punitive damages. *Nelson v. McLaughlin*, 211 Wis. 2d 487, 505 (1997); *Majorowicz v. Allied Mut. Ins. Co.*, 212 Wis. 2d 513, 539 (Ct. App. 1997); *Lucas v. Godfrey*, 161 Wis. 2d 51, 65 (Ct. App. 1990).
 - (4) Posttrial motion is not required to preserve the right to recover double costs and interest. *Gorman v. Wausau Ins. Cos.*, 175 Wis. 2d 320, 329 (Ct. App. 1993).
- c. In cases involving claims on insurance policies, the amounts recovered include amount from policy proceeds plus interest awarded under [Wis. Stat. § 628.46\(1\)](#) (requiring prompt payment of covered insurance claims). [Wis. Stat. § 807.01\(4\)](#) interest does not compound but does terminate accrual of [Wis. Stat. § 628.46\(1\)](#) interest. *Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co. (Upthegrove II)*, 152 Wis. 2d 7, 12–15 (Ct. App. 1989).

III. SETTLEMENTS OF CLAIMS FOR OR AGAINST MINOR OR MENTALLY INCOMPETENT PERSON [§ 12.433]

A. Settlement Before Action Commenced [§ 12.434]

See [Wis. Stat. § 807.10\(2\)](#).

1. Court must approve both settlement of claims in favor of minor or incompetent person and compromise of claims against minor or incompetent person.
2. Obtain approval in special proceeding in any court of record.
3. Who may apply for approval:
 - a. General guardian of estate of minor or incompetent person, if represented by attorney.
 - b. Guardian ad litem (GAL) of minor or incompetent person.
4. Order of approval has force and effect of judgment.

5. Filing petition for approval tolls the statute of limitation on the cause of action until a decision is rendered on petition because the proceeding is equivalent to the commencement of the action. [Wis. Stat.](#) § 893.13(2); *Carey v. Dairyland Mut. Ins. Co.*, 41 Wis. 2d 107 (1968).

B. Settlement After Action Commenced [§ 12.435]

See [Wis. Stat.](#) § 807.10(1).

1. Offer to accept or to compromise may be made either by the general guardian of the estate represented by attorney or by GAL. [Wis. Stat.](#) § 803.01(3).

NOTE: The court must appoint a GAL on the application of a party.

2. Offer to accept or to compromise must be approved by the court in which action or proceeding is pending.
3. If minor is not properly represented, judgment or order may be voided. [Wis. Stat.](#) § 803.01(3)(c)2.

C. Disposition of Proceeds [§ 12.436]

See [Wis. Stat.](#) § 807.10(3).

1. Settlement proceeds not exceeding \$50,000, exclusive of interest and costs, may be paid into existing general guardianship account. [Wis. Stat.](#) §§ 54.12, 867.03(1g).

If no general guardian of estate, court order approving settlement may

- a. Determine costs of action, including attorney fees and GAL fees;
- b. Authorize payment of settlement to clerk of court;
- c. Authorize and direct GAL to satisfy judgment or execute releases, and dismiss action on merits; and
- d. Under [Wis. Stat.](#) § 54.12(1)(a)–(f), order payment of expenses and dispose of balance pursuant to court-selected alternative:
 - (1) Deposit in insured financial institution or invest in interest-bearing obligations of the United States,
 - (2) Pay to parent or person having actual custody of minor,
 - (3) Pay to minor,
 - (4) Pay to actual or legal custodian or to care provider of incompetent person,
 - (5) Pay to agent under durable power of attorney, or
 - (6) Pay to trustee of trust created for ward.

2. If settlement exceeds \$50,000, the following apply:
 - a. If there is no general guardianship of estate, start one.
 - b. Under [Wis. Stat.](#) §§ 54.10 and 54.46(6), all minors and incompetent persons are subject to guardianship, except as follows:
 - (1) On marriage, a minor is no longer subject to guardianship unless incompetent.
 - (2) No guardianship needed if estate (here, settlement) does not exceed \$50,000.
 - c. General guardian of estate must file receipt for proceeds.

D. Settlement of Wrongful Death Claim When Decedent Had Spouse or Domestic Partner and Minor Children [§ 12.437]

See [Wis. Stat.](#) § 895.04(2).

1. In wrongful death actions, when the decedent leaves a spouse and minor children with whose support the deceased was legally charged, the court must approve any settlement even though the children have no right to the receipt of proceeds.
2. The court can impose a lien on up to one-half the settlement proceeds to protect the children.
3. If decedent had minor children, settlement is void without appropriate court approval.

IV. GENERAL RELEASE [§ 12.438]

A. Characteristics [§ 12.439]

1. Release is a unilateral contract. *Krenz v. Medical Protective Co.*, 57 Wis. 2d 387 (1973).
2. May be combination of agreements tailored to the situation:
 - a. Discharge from liability,
 - b. Covenant not to sue,
 - c. Hold-harmless guarantee,
 - d. Waiver and compromise, or
 - e. Accord and satisfaction.
3. Release in advance—exculpatory agreement, *see infra* § [12.17](#), may include
 - a. Release,

- b. Indemnity clause, or
- c. Assumption-of-risk clause.

B. Coverage [§ 12.440]

1. General rule is that parties' intent is the main determinative factor and is derived from the instrument and, if vague, surrounding conditions and circumstances; determination of intent is a question of fact; whether a release is *global* (i.e., is meant to cover unspecified claims), is also a question of fact. *Gielow v. Napiorkowski*, 2003 WI App 249, ¶ 14, 268 Wis. 2d 673; *see Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058, 1078 (1994); *Brown v. Hammermill Paper Co.*, 88 Wis. 2d 224 (1979); *Plummer v. Leonhard*, 44 Wis. 2d 686 (1969).
2. Specific situations
 - a. Pending actions. [Wis. Stat.](#) §§ 807.05, 807.13, 967.08.
 - (1) Settlement of pending actions must either be (1) made in court or during a proceeding conducted under [Wis. Stat.](#) §§ 807.13 or 967.08 and entered in the minutes or recorded by court reporter, or (2) made in writing and subscribed by party or party's attorney. *Subscribed* includes initials or printed name if affixed with proper authority. *Waite v. Easton-White Creek Lions, Inc. (In re Est. of Johnson)*, 2006 WI App 19, 289 Wis. 2d 100; *Laska v. Laska*, 2002 WI App 132, 255 Wis. 2d 823; *Adelmeyer v. Wisconsin Elec. Power Co.*, 135 Wis. 2d 367, 372 (Ct. App. 1986).
 - (2) Letters memorializing settlement agreement are sufficient if all essential terms of settlement are recited; however, settlement agreements must be properly and completely accepted before they are withdrawn to constitute binding settlement agreement (e.g., settlement with municipality must be approved by its legislative body). *Marks v. Gohlke*, 149 Wis. 2d 750 (Ct. App. 1989); *Kocinski v. Home Ins. Co.*, 147 Wis. 2d 728, 734–36 (Ct. App. 1988), *aff'd and remanded*, 154 Wis. 2d 56 (1990).
 - (3) Settlement of action is not vitiated by later change in applicable law (settlements contemplate finality). *Schauer v. DeNeveu Homeowners Ass'n*, 194 Wis. 2d 62 (1995).
 - (4) If action involves a claim under a fee-shifting statute, fees should be specifically discussed in the settlement agreement. Otherwise, fees may be lost. *Betz v. Diamond Jim's Auto Sales*, 2014 WI 66, 355 Wis. 2d 301.

NOTE: A fee agreement with a client should assign an attorney fees claim, and the defendant should be given notice of the assignment.

- b. Motor vehicle sponsorship

Release of minor releases sponsor from contribution to nonsettling tortfeasor. *Jackson v. Ozaukee Cnty.*, 111 Wis. 2d 462 (1983). *But see Swanigan v. State Farm Ins. Co.*, 99 Wis. 2d 179 (1980) (if sponsor is sued directly).

c. Consortium

Werdehoff v. General Star Indem. Co., 229 Wis. 2d 489, 512 (Ct. App. 1999); *Arnold v. Shawano Cnty. Agric. Soc’y*, 106 Wis. 2d 464 (Ct. App. 1982), *aff’d*, 111 Wis. 2d 203 (1983), *overruled on other grounds by Green Spring Farms v. Kersten*, 136 Wis. 2d 304 (1989).

- (1) Spouse’s action for loss of consortium for injury to other spouse is a separate cause of action that cannot be released by injured spouse.
- (2) Marital relationship does not lead to a presumption of agency, although negligence of injured spouse may bar or limit recovery.
- (3) Consortium action is derivative and must be joined with the principal action. [Wis. Stat. § 803.03\(2\)](#).

d. Corporations

Release of stockholders does not release corporation. *Bank of Verona v. Stewart*, 223 Wis. 577 (1937).

e. Insured versus insurer

Release of insured might not always release insurer. *Loy v. Bunderson*, 107 Wis. 2d 400 (1982).

f. Malpractice

Rebuttable presumption that general release of original tortfeasor does not release malpractice cause of action against physician for damages that might have been recovered against original tortfeasor, unless such intention is clearly and expressly stated in release. *Krenz v. Medical Protective Co.*, 57 Wis. 2d 387, 400–01 (1973).

g. Criminal restitution

Global release of defendant-tortfeasor may preclude collection of unpaid restitution after defendant’s probation ends but only when restitution order is converted to a civil judgment pursuant to [Wis. Stat. § 973.20\(1r\)](#). *Huml v. Vlazny*, 2006 WI 87, 293 Wis. 2d 169.

CAUTION: To ensure that all parties understand the effect of the release when it is executed, the release should specifically reference the civil judgment for restitution entered in the criminal case.

C. Validity [§ 12.441]

1. Analysis of a release is based on principles of contract law—not reading contract or not being aware of unambiguous terms are not bases for relief from terms. *Raasch v. City of Milwaukee*, 2008 WI App 54, 310 Wis. 2d 230.

2. Especially with an exculpatory contract, release may be *void* if it violates public policy; validity of exculpatory agreement will be evaluated for violation of public policy and for determination that the contract expresses parties' intent with particularity (whether release is void for public policy depends on particular facts and circumstances); validity of exculpatory contract is determined on a case-by-case basis. Limited-damages clauses in commercial contracts may be examined for exculpatory character versus valid stipulated-damages clause. *Rose v. National Tractor Pullers Ass'n*, 33 F. Supp. 2d 757, 765 (W.D. Wis. 1998); *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20, 367 Wis. 2d 386; *Rainbow Country Rentals v. Ameritech Publ'g*, 2005 WI 153, ¶¶ 25–38, 286 Wis. 2d 170; *Atkins v. Swimwest Fam. Fitness Ctr.*, 2005 WI 4, ¶¶ 13–17, 277 Wis. 2d 303; *Yauger v. Skiing Enters.*, 206 Wis. 2d 76 (1996); *Richards v. Richards*, 181 Wis. 2d 1007 (1994); *Dobratz v. Thomson*, 161 Wis. 2d 502 (1991); *Arnold v. Shawano Cnty. Agric. Soc'y*, 111 Wis. 2d 203 (1983); *Fire Ins. Exch. v. Cincinnati Ins. Co.*, 2000 WI App 82, ¶¶ 24–29, 234 Wis. 2d 314; *Eder v. Lake Geneva Raceway, Inc.*, 187 Wis. 2d 596 (Ct. App. 1994).
3. Exculpatory contracts are not favored and are construed strictly. *Atkins*, 2005 WI 4, 277 Wis. 2d 303. Invalidating grounds may include any of the following:
 - a. Excessively broad coverage or lack of detail or customization. *Brooten v. Hickok Rehab. Servs., LLC*, 2013 WI App 71, ¶¶ 10–13, 348 Wis. 2d 251.
 - b. Particular risk is not within the contemplation of parties. *Brooten*, 2013 WI App 71, ¶ 14, 348 Wis. 2d 251.
 - c. Attempt to excuse intentional, reckless, or illegal conduct. *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶ 23 n.9, 274 Wis. 2d 719; *Fire Ins. Exch.*, 2000 WI App 82, ¶ 28, 234 Wis. 2d 314; *Werdehoff v. General Star Indem. Co.*, 229 Wis. 2d 489, 507 (Ct. App. 1999).
 - d. Attempt to excuse employer liability to employee.
 - e. Attempt to relieve performance of a service that is important to the public or against public policy.
 - f. Unequal bargaining power (may be evidenced by standardized form) or lack of opportunity for negotiation. *Brooten*, 2013 WI App 71, ¶ 9, 348 Wis. 2d 251.
 - g. Ambiguity.
 - h. Factual misstatement, misrepresentation, or fraud forms the basis of the contract.
 - i. Circumstances under which the exculpatory release was obtained did not permit contemplation; disguised or blended into multipurpose document—failure of form to inform signer of its significance.
 - j. Failure to clearly and unmistakably inform signer of what is being waived.

NOTE: An exculpatory release may be void for a combination of factors, even if no one factor alone requires invalidation. To be enforceable, the release must be clear, unambiguous, and unmistakable to the layperson.

4. Tort-liability disclaimer must make it apparent that waiver is quid pro quo for negotiated economic advantage. *Phillips Petroleum v. Bucyrus-Erie Co.*, 131 Wis. 2d 21, 33 (1986).
5. Valid exculpatory agreement also releases insurer. *Trainor v. Aztalan Cycle Club, Inc.*, 147 Wis. 2d 107 (Ct. App. 1988).
6. Release (general or exculpatory) may be *voidable* if insufficient in its particulars.
 - a. Lack of valid consideration; although mere *inadequacy* of consideration does not of itself invalidate, it may be strong evidence of mistake. *Frieders v. Estate of Frieders*, 180 Wis. 430 (1923); 66 Am. Jur. 2d *Release* § 14 (2011).
 - b. Mutual mistake of a past or present fact. *Krezinski v. Hay*, 77 Wis. 2d 569 (1977).
 - c. Particular injuries or claims not within contemplation of parties to release.
 - (1) All-inclusive language of release is not necessarily conclusive. *Liles v. Employers Mut. Ins. Co.*, 126 Wis. 2d 492 (Ct. App. 1985).
 - (2) Even though release expressly covers unknown injuries, this does not bar action for unknown injuries if it can be shown that unknown injuries were not within contemplation of parties when settlement was agreed on.
 - (3) Possible to intentionally settle for unknown injuries; whether release contemplated unknown injuries is a question of fact.
 - d. Fraud and misrepresentation.
 - e. Duress and undue influence.
 - f. Lack of assent.
 - g. Lack of capacity.

V. PARTIAL SETTLEMENTS [§ 12.442]

A. In General [§ 12.443]

1. Court policy is to encourage settlements, whether whole or partial. *Teigen v. Jelco*, 124 Wis. 2d 1 (1985).
2. Plaintiff may discharge one defendant to a tort action without discharging another. *Loy v. Bunderson*, 107 Wis. 2d 400 (1982).

CAUTION: Any release not intended to release whole cause of action should be drafted with precision and explicitly state what and who is released or not released.

B. *Pierringer* Release [§ 12.444]

1. *Pierringer* releases derive from *Pierringer v. Hoger*, 21 Wis. 2d 182 (1963).

2. Purpose is to release one or more but not all joint tortfeasors in an action, reserving the right to pursue nonsettling parties. Exclusively for use when there are joint tortfeasors. *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 120 (Ct. App. 1991).
3. In exchange for a sum from the settling defendant, plaintiff agrees to satisfy such percentage of judgment that plaintiff ultimately recovers as settling tortfeasor's causal negligence as it bears to all causal negligence of all co-tortfeasors (whether or not all co-tortfeasors are joined in action). *Unigard Ins. Co. v. Insurance Co. of N. Am.*, 184 Wis. 2d 78 (Ct. App. 1994).

NOTE: The negligence of all joint tortfeasors must still be apportioned according to their degree of culpability. *Payne v. Bilco Co.*, 54 Wis. 2d 424 (1972).

4. Effect.
 - a. Imputes to settling plaintiff whatever liability in contribution or indemnity the settling defendant may have to nonsettling defendants. Nonsettling tortfeasor has no control over claimant's decision to settle with another tortfeasor. *VanCleve v. City of Marinette*, 2003 WI 2, ¶¶ 39–41, 258 Wis. 2d 80; *City of Menomonie v. Evenson Dodge, Inc.*, 163 Wis. 2d 226 (Ct. App. 1991).
 - b. Upon trial, release is given immediate effect, preventing contribution to nonsettling tortfeasors from settling tortfeasors.
 - c. Judgment against nonsettling defendants is only for that percentage of negligence allocated by findings or verdict.
 - d. Insulates settling defendant from any possible liability for contribution; transfers liability for contribution from settling defendant to plaintiff. *Imark Indus. v. Arthur Young & Co.*, 148 Wis. 2d 605, 621–22 (1989).
 - e. Protects nonsettling defendant from being liable for more than its share.
 - f. Relieves settling defendants of risk of joint and several liability.
 - g. Settling tortfeasor is also relieved of liability for any negligence of immune defendants and nonparties assigned to it. *Raby v. Moe*, 149 Wis. 2d 370, 394–95 (Ct. App. 1989), *rev'd on other grounds*, 153 Wis. 2d 101 (1990); *Larsen v. Wisconsin Power & Light Co.*, 120 Wis. 2d 508, 520–21 (Ct. App. 1984).
5. Benefit to plaintiff is that the recovery of sum from settling defendants is certain.
6. Risk to plaintiff—distinct consequences arise from execution of *Pierringer* release; for example, the fact-finder may heap liability on settling defendant, reducing the chance to collect from nonsettlers.

CAVEAT: A *Pierringer* release of an intentional joint tortfeasor also releases a claim against a nonsettling, negligent joint tortfeasor because the latter has a right of indemnity from the intentional joint tortfeasor. *Mueller v. Bull's Eye Sport Shop LLC*, 2021 WI App 34, ¶¶ 60–61, 398 Wis. 2d 329; *Fleming v. Threshermen's Mut. Ins. Co.*, 131 Wis. 2d 123 (1986).

CAVEAT: A *Pierringer* release of a solely negligent joint venturer also releases other joint venturers. *Schroeder v. Pedersen*, 131 Wis. 2d 446 (Ct. App. 1986).

CAVEAT: If a settling plaintiff assumes the strictly liable tortfeasor's share of responsibility for damages, leaving only ordinarily negligent tortfeasors as defendants, the plaintiff has assumed all liability attributable to the product. *St. Clare Hosp. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis. 2d 750, 760 (Ct. App. 1989).

7. *Pierringer* release is different from a covenant not to sue, which does not affect nonsettling joint tortfeasor's right to indemnity from settling joint tortfeasor; under covenant not to sue, there is no settlement within the scope of accord and satisfaction, and plaintiff's whole cause of action remains against nonsettling joint tortfeasor. *Imark*, 148 Wis. 2d at 621–22.
8. Wisconsin has enacted the Uniform Joint Obligation Act; however, the primary source of settlement-and-contribution law is case law. [Wis. Stat.](#) ch. 113.

C. *Loy* Release and Covenant Not to Sue: the Excess/Secondary Coverage Situation [§ 12.445]

1. In *Loy v. Bunderson*, 107 Wis. 2d 400 (1982), plaintiff released defendant-driver and his insurer for \$20,000 of \$50,000 policy limit, but reserved the right to pursue defendant's employer's insurer (considered excess carrier) for damages assessed greater than \$50,000 but less than that policy's limit of \$500,000.
 - a. Court approved arrangement, finding it not to be a release of defendant-driver but solely a covenant not to sue defendant-driver.
 - b. Opinion distinguished between covenant not to sue and release; court stated:

‘A covenant not to sue should be distinguished from a release in that it is not a present abandonment or relinquishment of the right or claim but is merely an agreement not to sue on an existing claim. It does not extinguish the cause of action. As between the parties to the agreement, the final result is the same in both cases. The difference is primarily in the effect as to third parties, and is based mainly on the fact that in the case of a release there is an immediate release or discharge, whereas in the other case there is merely an agreement not to prosecute a suit. A covenant not to sue is nothing but a contract, and should be so construed.’

Loy, 107 Wis. 2d at 420 (quoting 66 Am. Jur. 2d *Release* § 2, at 679 (1973)).
 - c. *Loy* court authorized use of standards of Uniform Declaratory Judgments Act to determine the rights of parties under proposed release arrangement. [Wis. Stat.](#) § 806.04.
2. Insurer is directly liable to plaintiff if the underlying conditions of negligence are satisfied, even though after commencement of action, insured is released or protected by absolute covenant not to sue. *Loy*, 107 Wis. 2d at 426.
3. Insurance company's responsibility to injured party is derivative of insured's conduct but not derivative of status of insured's personal liability to plaintiff when insurer's contractual obligations are triggered by judgment for damages. *Loy*, 107 Wis. 2d at 426.

4. *Loy* reaffirmed in a true primary-excess insurance situation. *Teigen v. Jelco*, 124 Wis. 2d 1 (1985).
5. Limit on *Loy* release: Must contain no fundamental unfairness to excess carrier (i.e., must not result in liability greater than excess carrier contracted to pay). *Balk v. Farmers Ins. Exch.*, 138 Wis. 2d 339, 349 (Ct. App. 1987).

CAUTION: In an underinsured motorist (UIM) situation in which the UIM policy contains unambiguous language requiring exhaustion of primary policy, UIM coverage may be lost. *Danbeck v. American Fam. Mut. Ins. Co.*, 2001 WI 91, 245 Wis. 2d 186.

6. Settling parties moved for “declaration of rights,” with requested findings, under release proposals.

NOTE: The court will scrutinize an agreement to determine whether it is a *Loy* or *Pierringer* release and will not be governed by the document’s label. *Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058 (1994).

VI. SUBROGATION [§ 12.446]

A. In General [§ 12.447]

1. Definition: Substitution of one person in place of another as owner of claim; subrogee’s rights are not separate from those of subrogor—each owns a separate part of the total claim; insurer cannot recover from third party unless insured has right of recovery; statute of limitation for subrogation claim is same as for underlying tort. *General Accident Ins. Co. v. Schoendorf & Sorgi*, 202 Wis. 2d 98, 109 (1996); *Mutual Serv. Cas. Co. v. American Fam. Ins. Grp.*, 140 Wis. 2d 555 (1987); *Wilmot v. Racine Cnty.*, 136 Wis. 2d 57 (1987); *Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, 246 Wis. 2d 385; *Continental Cas. Co. v. Homontowski*, 181 Wis. 2d 129, 135 (Ct. App. 1993); 73 Am. Jur. 2d *Subrogation* § 1 (2019).

CAUTION: *Do not* settle a claim without accounting for the interests of the subrogated parties; the subrogated insurer may have a cause of action to enforce its subrogation rights against the tortfeasor’s insurer despite the settlement between the injured party and the tortfeasor’s insurer. Settlement agreements must allow the subrogated insurer to assert that the injured settlor was made whole (i.e., to participate in *Rimes* hearing). *Schulte v. Frazin*, 176 Wis. 2d 622 (1993); *Mutual Serv.*, 140 Wis. 2d 555; *see Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263 (1982).

2. Rests on equitable principle that a person (usually but not necessarily an insurer) other than a volunteer who pays for the wrong of another should be permitted to look to wrongdoer to extent of its payment, and be subject to defenses of wrongdoer; in some insurance situations, may be mixed or confused with recoupment or contribution. Generally, a person seeking subrogation must have superior equity over the other party. *Zurich Am. Ins. v. Wisconsin Physicians Servs. Ins.*, 2007 WI App 259, ¶ 31, 306 Wis. 2d 617.
3. Entire law of subrogation is based on equitable principles and depends on the application of these principles to specific facts of case. *Vogt v. Schroeder*, 129 Wis. 2d 3 (1986).
4. Purposes of subrogation are to prevent unjust enrichment or double recovery and to place the loss ultimately on wrongdoers. Once plaintiff has been paid in full by subrogated insurer, the

insurer's settlement with tortfeasor for less does not entitle plaintiff to seek the difference from tortfeasor. *Dufour v. Progressive Classic Ins. Co.*, 2016 WI 59, 370 Wis. 2d 313; *Fischer v. Steffen*, 2011 WI 34, ¶¶ 31, 32, 333 Wis. 2d 503; *Cunningham v. Metropolitan Life Ins. Co.*, 121 Wis. 2d 437 (1985).

5. Types of subrogation (*see generally Garrity v. Rural Mut. Ins. Co.*, 77 Wis. 2d 537 (1977)) include the following:
 - a. Legal-equitable: Arises from application of principles of equity or operation of law when a person other than a mere volunteer pays a debt that in equity and good conscience should be satisfied by another. It is derived from theory of unjust enrichment and does not require a written contract. *Wisconsin Patients Comp. Fund v. WHCLIP*, 200 Wis. 2d 599, 619–20 (1996); *Millers Nat'l Ins. Co. v. City of Milwaukee*, 184 Wis. 2d 155 (1994); *Wachovia Mortg. FSB v. Dallas*, 2011 WI App 54, ¶¶ 6–7, 332 Wis. 2d 426.
 - b. Conventional: Arises from contract or acts of parties. HMOs may assert contractual subrogation rights. *Torres v. Dean Health Plan, Inc.*, 2005 WI App 89, 282 Wis. 2d 725.
 - c. Statutory: Arises from legislative act that vests a right of subrogation with a party or class of parties. *Houle v. School Dist. of Ashland*, 2003 WI App 214, ¶ 8, 267 Wis. 2d 708.
6. Wisconsin application of subrogation rights. *Rimes*, 106 Wis. 2d 263; *Garrity*, 77 Wis. 2d at 543–44.
 - a. Court has given effect to express subrogation clauses contained in insurance contracts and has found right of subrogation in some cases in which there is no subrogation clause. *Cunningham*, 121 Wis. 2d at 446.
 - b. Subrogation clauses and indemnity clauses are strictly construed against insurer in the event of ambiguity or obscurity. *Cunningham*, 121 Wis. 2d at 450.
 - c. When no express subrogation clause exists and insurer claims subrogation, court must analyze insurance contract to determine whether contract is of investment or indemnity. *Cunningham*, 121 Wis. 2d at 446.
 - d. Investment contract must have express subrogation clause or insurer has no right of subrogation. *Cunningham*, 121 Wis. 2d at 446.
 - e. Investment contract concerns only insurer and insured or insured's beneficiary; insured has paid for the benefit; investment quid pro quo is involved (e.g., fixed benefit payable upon happening of triggering event). *Rixmann v. Somerset Pub. Sch.*, 83 Wis. 2d 571 (1978).
 - f. Indemnity contract exists if the purpose of contract is merely to indemnify insured from whatever loss insured or a dependent sustained by reason of specified hazard (e.g., surety). *Cunningham*, 121 Wis. 2d at 455; *Patitucci v. Gerhardt*, 206 Wis. 358 (1932).
 - g. Party seeking to prove right of subrogation has the burden of proving the right to subrogation; subrogation rights can be waived by conduct or failure to plead. *Jindra v. Diederich Flooring*, 181 Wis. 2d 579, 596 (1994); *Cunningham*, 121 Wis. 2d at 445–56;

Leonard v. Dusek, 184 Wis. 2d 267 (Ct. App. 1994); see *Konkel v. Acuity*, 2009 WI App 132, ¶¶ 11–15, 321 Wis. 2d 306.

- h. Insurer generally has no right of subrogation or indemnification against its own insured, only against others. *Rural Mut. Ins. Co. v. Peterson*, 134 Wis. 2d 165 (1986).
- i. Wisconsin resident injured in Wisconsin but employed by Iowa corporation with Iowa-based group health insurance entitled to be made whole despite Iowa law to contrary. *Drinkwater v. American Fam. Mut. Ins. Co.*, 2006 WI 56, 290 Wis. 2d 642.
 - (1) Except if operation of law extends policy coverage beyond express wording of policy and policy has reimbursement clause.
 - (2) Except if wrongdoer and insured are the same person. *Madsen v. Threshermen's Mut. Ins. Co.*, 149 Wis. 2d 594, 604–05 (Ct. App. 1989).
- j. Subrogation is usually a tort-insurance issue but *may* apply in nontort situations, such as lender or borrower. Equitable subrogation contemplates a balancing of equities between competing claimants. *Ocwen Loan Servicing v. Williams*, 2007 WI App 229, 305 Wis. 2d 772; *Countrywide Home Loans, Inc. v. Schmidt*, 2007 WI App 243, 306 Wis. 2d 200; *Seelen v. Couillard (In re Couillard)*, 486 B.R. 466 (Bankr. W.D. Wis. 2012).

B. Extent and Limit of Subrogated Right [§ 12.448]

1. Insofar as a new right is created in favor of subrogee, “the original right measures the extent of the new right,” subject to insured’s right to be made whole; and subrogee’s interest is limited to amount of payments it has made, reduced by own insured’s comparative negligence. A *subrogee* is one who steps into the shoes of the subrogor to the extent it has made payment as a result of an actionable event. *Wilmot v. Racine Cnty.*, 136 Wis. 2d 57 (1987); *Garrity v. Rural Mut. Ins. Co.*, 77 Wis. 2d 537, 541 (1977); *Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740, 774 (1993); *Sorge v. National Car Rental Sys.*, 182 Wis. 2d 52 (1994); *Szalacinski v. Campbell*, 2008 WI App 150, ¶ 51, 314 Wis. 2d 286; 4 *Williston on Contracts* § 1265, at 844 (3d ed. 1967).
2. Insured is entitled to be made whole before subrogated party shares in recovery, but legislatively (federal and state) sanctioned subrogation (including ERISA) may override made-whole principles. Wrongful death plaintiffs are entitled to be made whole. Made-whole doctrine might not apply if claimant-insureds settle for less than settlement funds available, even if settlement is less than insured’s total claim. *Petta v. ABC Ins. Co.*, 2005 WI 18, 278 Wis. 2d 251; *Ruckel v. Gassner*, 2002 WI 67, 253 Wis. 2d 280; *Garrity*, 77 Wis. 2d at 538; see *Muller v. Society Ins.*, 2008 WI 50, 309 Wis. 2d 410; *Employers Mut. Cas. Co. v. Kujawa*, 2015 WI App 26, 361 Wis. 2d 213.
 - a. Test of wholeness is whether insured has been compensated for *all* elements of damage (but not insured’s attorney fees and costs); when subrogee does not participate in prosecution of action, its claim may be reduced for attorney fees (but ERISA plan language may preclude reduction for attorney fees and costs). *Oakley v. Fireman's Fund Ins. Co.*, 162 Wis. 2d 821 (1991); *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 275 (1982); *Johnson v. Ziegler*, 2002 WI App 103, 255 Wis. 2d 751; *Ninaus v. State Farm Mut. Auto. Ins. Co.*, 220 Wis. 2d 869, 887–88 (Ct. App. 1998).

- b. *Made whole* means all damages to which insured is legally entitled after consideration of comparative negligence; statutory limit on plaintiff's recovery if plaintiff is more than 50% at fault does not apply at mini-trial—a pure comparison. *Sorge*, 182 Wis. 2d 52.
- c. *Rimes* approved use of mini-trial procedure to determine the full extent of damages and whether insurer is entitled to any portion of settlement proceeds. *Rimes*, 106 Wis. 2d at 277.
- d. Fact that plaintiff has given general release and settled entire action against tortfeasor(s) does not mean plaintiff has been made whole. But under some circumstances, settling for less than total claim may mean that made-whole doctrine does not apply. Made-whole doctrine not applicable to claim brought by subrogated insurer against tortfeasor or tortfeasor's insurer if subrogated insurer's insured has previously settled with tortfeasor. *Rimes*, 106 Wis. 2d at 273. *But see Dufour v. Progressive Classic Ins. Co.*, 2016 WI 59, ¶ 32, 370 Wis. 2d 313; *Muller v. Society Ins.*, 2008 WI 50, 309 Wis. 2d 410.

NOTE: In made-whole questions, there is a difference between property-damage cases and personal-injury cases. *See Employers Mut. Cas. Co. v. Kujawa*, 2015 WI App 26, ¶ 10, 361 Wis. 2d 213.

NOTE: If only remaining claim is owned by subrogated carrier (i.e., injured party could not bring the claim), "made whole" does not apply.

C. Joinder of Subrogated Party as Necessary Party [§ 12.449]

1. Party asserting principal claim must join all persons or entities having subrogation rights (subrogated insurer should be joined as party plaintiff). [Wis. Stat.](#) § 803.03(2)(a); *Sampson v. Logue*, 184 Wis. 2d 20, 28 (Ct. App. 1994).
2. Subrogated party who commences action must join the person from whom rights are derived. [Wis. Stat.](#) § 803.03(2)(a).
3. Court must ask parties whether subrogation rights are outstanding and must make orders necessary to bring them into action. [Wis. Stat.](#) §§ 803.03(2)(c), 804.04(3).
4. Under [Wis. Stat.](#) § 803.03(2)(b), after joinder, joined parties have several options:
 - a. Participate in action. *Peissig v. Wisconsin Gas Co.*, 155 Wis. 2d 686, 702 (1990).
 - b. Agree to have interest represented by party who caused joinder (must file written waiver with court).
 - c. Move for dismissal of party from the action with or without prejudice (to obtain dismissal without prejudice, must show reason why unjust to require prosecution of its claim at that time).

NOTE: If the Department of Health Services (DHS) has a medical assistance subrogation interest and it fails to select an option under [Wis. Stat.](#) § 803.03(2)(b), the claimant will automatically represent the department's interests. [Wis. Stat.](#) § 803.03(2)(bm).

NOTE: If a subrogated party stays in the action and loses, costs are awarded against it; if

the DHS or a county is joined because of medical assistance, it will not be liable for costs. [Wis. Stat.](#) § 814.03(3); *Sampson*, 184 Wis. 2d at 29.

- d. Failure to exercise one of above options may cause loss of subrogation rights. *Radloff v. General Cas. Ins. Co.*, 147 Wis. 2d 14 (Ct. App. 1988).
 - e. Subrogated parties have a duty to protect their own interests in court proceedings. *Buchanan v. General Cas. Co.*, 191 Wis. 2d 1 (Ct. App. 1995).
5. An assignment does not relieve obligation to join a subrogated party when suit is commenced. *Bruner v. Kops*, 105 Wis. 2d 614 (Ct. App. 1981).

D. Special Situations: Federal and State [§ 12.450]

1. Public medical assistance or Medicaid. [Wis. Stat.](#) § 49.89.
 - a. State, county, municipal, or tribal governing body has subrogated interest in claim against third party (common-law subrogation principles not applicable to [Wis. Stat.](#) § 49.89 subrogation). [Wis. Stat.](#) § 49.89; *Milwaukee Cnty. v. Hartford Cas. Co.*, 151 Wis. 2d 463, 469 (Ct. App. 1989).

NOTE: Medicaid third-party collection process information may be found at <http://www.wicasualty.com/wi/recovery.asp> (last visited Mar. 15, 2022).

- b. Aid recipient need not be made whole first. *DeHaven v. Dan-Co FS Coop.*, 128 Wis. 2d 472 (Ct. App. 1986); *Coplien v. Department of Health & Soc. Servs.*, 119 Wis. 2d 52 (Ct. App. 1984); *Waukesha Cnty. v. Johnson*, 107 Wis. 2d 155 (Ct. App. 1982).
 - c. Application for benefits constitutes assignment from recipient; both agency and recipient are necessary parties. Attorney employed by aid recipient must give notice to the agency that provided assistance. [Wis. Stat.](#) §§ 49.89(3), (3m), 808.03(2). Subrogation recovery information form should be submitted to the DHS. *See* <http://www.wicasualty.com/wi/recovery.asp> (last visited Mar. 15, 2022).
 - d. Release by recipient alone does not release liable party or liable party's insurer; state has lien on judgment or settlement until lien is discharged. [Wis. Stat.](#) § 49.89(2), (8)(a).
 - e. Claimant or claimant's attorney must give notice of action (filing, intervention, consolidation) and settlement to the DHS by certified mail. [Wis. Stat.](#) § 49.89(3m).
 - f. Under [Wis. Stat.](#) § 49.89(5), distribution of recovery is as follows:
 - (1) Reasonable costs of collection, including attorney fees, then
 - (2) Reimbursement of amount of assistance granted as result of occurrence, then
 - (3) Remainder to recipient.
2. Medicare Secondary Payer. 42 [U.S.C.](#) § 1395y(b)(2). *See generally* 42 [C.F.R.](#) pt. 411; *see also* Aaron Frederickson, *Medicare's Stakes in PI Settlements*, Wis. Law., Sept. 2012, at 18.

- a. Medicare does not cover medical services to the extent that payment has been or reasonably can be expected to be made under automobile, medical, no-fault, liability, or worker's compensation policies, plans, or claims. Set-aside accounts may be necessary.

PRACTICE TIP: Although set-aside accounts have been required in worker's compensation cases for years, if a personal injury settlement involves compensation for future medical expenses, it is a best practice for a plaintiff recovering such a settlement to create a set-aside account.

- b. Medicare may make conditional payments and obtain reimbursement from settlement or judgment; will adjust for costs of collection.
- c. Under 42 [C.F.R.](#) § 411.37, reimbursement formula is as follows:

Total procurement costs (including attorney fees) ÷ Settlement or judgment amount = payment ratio.

Payment ratio × Amount of Medicare's payment = Medicare's share of procurement costs.

Amount of Medicare's payment – Medicare's share of procurement = Amount to be refunded to Medicare.

- d. If not reimbursed, recipient may be personally liable.
- e. In extraordinary circumstances, reimbursement may be compromised or waived. 42 [C.F.R.](#) § 411.28.
3. Federal Employee Compensation Act (FECA). 5 [U.S.C.](#) § 8131; 5 [U.S.C.](#) § 8132.
- Formula provided for reimbursement of FECA payment when recovery from third party. Basically:
- a. Injured worker is guaranteed recovery of one-fifth of net amount after deducting reasonable attorney fees and costs.
- b. Any remainder after fully reimbursing federal government is credit to any future payments under FECA.
4. Federal Medical Care Recovery Act (FMCRA). 42 [U.S.C.](#) §§ 2651–2653.
- a. Whenever the federal government pays for medical expenses caused by third-party negligence, it is subrogated to the injured person's claim for medical expenses.
- b. Contact the district's U.S. Attorney.
5. Medical services to veterans. 38 [U.S.C.](#) § 1729.

- a. If a veteran is furnished medical services through the Department of Veterans Affairs (VA) for a non-service-connected disability resulting from third-party negligence, the federal government might have subrogation rights for the services provided.
 - b. Contact the Office of District Counsel, VA, or U.S. Attorney.
6. Wisconsin state employees' health plan is subject to subrogation (made-whole) law. *Leonard v. Dusek*, 184 Wis. 2d 267 (Ct. App. 1994).
7. Worker's compensation (WC). [Wis. Stat.](#) § 102.29.
- a. Wisconsin Department of Workforce Development (DWD) (if claim is paid by state uninsured employers' fund), employer, or compensation insurer that must pay lawful claim has the right to make claim or maintain action in tort (including wrongful death) against any other party for such injury or death; compensation insurer has same rights in third-party action as injured employee. [Wis. Stat.](#) § 102.29(1); *Threshermens Mut. Ins. Co. v. Page*, 217 Wis. 2d 451, 481 (1998); *Stolper v. Owens-Corning Fiberglass Corp.*, 178 Wis. 2d 747 (Ct. App. 1993); *Employers Mut. Liab. Ins. Co. v. Liberty Mut. Ins. Co.*, 131 Wis. 2d 540 (Ct. App. 1986).
 - b. Statutory distribution formula ([Wis. Stat.](#) § 102.29(1)) applies if (1) action is grounded in tort, (2) action is for employee's injury or death, and (3) employer has liability. WC payor does not have right of reimbursement against contract claims of injured party (e.g., uninsured-motorist (UM) claims) or against claim against attorney who mishandled the WC claim. *Berna-Mork v. Jones*, 174 Wis. 2d 645 (1993); *Kottka v. PPG Indus., Inc.*, 130 Wis. 2d 499, 514 (1986); *Smith v. Long*, 178 Wis. 2d 797 (Ct. App. 1993).
 - c. Employee, employer or compensation carrier, and the DWD must give any other party reasonable notice and an opportunity to join in making claim or instituting action and to be represented by counsel; each has equal voice in prosecution of the action; failure of WC payor to participate does not void right to statutory distribution; also, notice is statutory prerequisite to distribution. WC carrier's attorney may share in costs of collection. If employee and compensation carrier disagree on whether to accept an offer, the court decides whether offer must be accepted. [Wis. Stat.](#) § 102.29(1); *Elliott v. Employers Mut. Cas. Co.*, 176 Wis. 2d 410 (Ct. App. 1993); see *Adams v. Northland Equip. Co.*, 2014 WI 79, ¶ 4, 356 Wis. 2d 529; *Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, 281 Wis. 2d 66; *Bergren v. Staples*, 263 Wis. 477 (1953); *Dalka v. American Fam. Mut. Ins. Co.*, 2011 WI App 90, ¶¶ 5–8, 334 Wis. 2d 686.
 - d. Regardless of who commences suit against third party, the proceeds, after deduction of reasonable cost of collection, must be divided between injured employee and payor of compensation benefits in manner provided by [Wis. Stat.](#) § 102.29(1) (Worker's Compensation Act distribution formula is mandatory and not limited by common-law or equitable considerations). *Nelson v. Rothering*, 174 Wis. 2d 296 (1993); *Skornia v. Highway Pavers, Inc.*, 34 Wis. 2d 160 (1967); *Simanek v. Miehle-Goss-Dexter*, 113 Wis. 2d 1 (Ct. App. 1983).
 - e. Reimbursement of WC payor extends to the amounts payor paid to state treasury. [Wis. Stat.](#) § 102.29(2); *Gerth v. American Star Ins. Co.*, 166 Wis. 2d 1000 (Ct. App. 1992).
 - f. Distribution of proceeds under [Wis. Stat.](#) § 102.29(1)(b) is the following:

- (1) Reasonable cost of collection; then
- (2) One-third of remainder to employee; then
- (3) Reimbursement to employer, employer's compensation carrier, or the DWD for all payments made *or obligated to be made in the future* (portion of settlement may be ordered into account for payment of future worker's compensation benefits (*cushion fund*)), *Sutton v. Kaarakka*, 168 Wis. 2d 160 (Ct. App. 1992); then

NOTE: Reimbursement to the WC payor includes the interest awarded in judgment attributable to the payor's payments but does not include penalty payments. *Hauboldt v. Union Carbide Corp.*, 160 Wis. 2d 662, 684–88 (1991).

- (4) Any balance to employee or the employee's personal representative or other person entitled to bring action.
- g. Statutory distribution formula may be modified only with consent of parties; common-law principle of being made whole does not apply to WC third-party actions (reimbursement formula cannot be modified by circuit court without agreement, even for equitable considerations). *Nelson*, 174 Wis. 2d 296; *Kottka v. PPG Indus., Inc.*, 130 Wis. 2d 499 (1986); *Huck v. Chicago, St. P., M., & O. Ry.*, 14 Wis. 2d 445 (1961); *Martinez v. Ashland Oil, Inc.*, 132 Wis. 2d 11 (Ct. App. 1986).

NOTE: [Wis. Stat.](#) § 102.29 did not anticipate structured settlements. If the up-front portion of the settlement amount is adequate to fully reimburse the WC payor after deducting collection costs and the employee's initial one-third, the employee and the tort defendant cannot deprive the payor of its right to reimbursement without its consent (i.e., force it to accept payments over the term of the settlement). *Skirowski v. Employers Mut. Cas. Co.*, 158 Wis. 2d 242 (Ct. App. 1990).

- h. Settlement of any third-party claim is void unless settlement and distribution of proceeds are approved by the court before whom action pending; if no action is pending, then by a court of record or by the DWD or the Division of Hearings and Appeals in the Department of Administration. [Wis. Stat.](#) § 102.29(1)(d).
- i. Additional or augmented injury arising out of treatment for compensable injury is also compensable as part of the compensation claim. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 315–16 (1981); *Holdmann v. Smith Labs.*, 151 Wis. 2d 813, 816–18 (Ct. App. 1989).
- j. The part of damages in third-party action attributable to surviving spouse's derivative claim for loss of consortium is not subject to statutory distribution formula; however, when proceeds of third-party claim are divided among different elements of damage for one claim, right of reimbursement applies to total amount; damages for surviving spouse's pecuniary loss are subject to [Wis. Stat.](#) § 102.29(1) division. *Johnson v. ABC Ins. Co.*, 193 Wis. 2d 35 (1995); *Nelson*, 174 Wis. 2d 296; *Kottka*, 130 Wis. 2d at 521.
- k. When claims not subject to a [Wis. Stat.](#) § 102.29(1) allocation compete for insufficient settlement proceeds with claims subject to [Wis. Stat.](#) § 102.29(1) allocation, circuit court must use the following formula (makes no difference if insufficiency is caused by coverage limits or settlement amount). *Green v. Advance Finishing Tech., Inc.*, 2005 WI

App 70, ¶¶ 8–10, 280 Wis. 2d 743; *Brewer v. Auto-Owners Ins. Co.*, 142 Wis. 2d 864, 869 (Ct. App. 1987).

- (1) Determine value of each claim.
 - (2) Prorate settlement proceeds between all claims.
 - (3) Distribute amounts allocated to those claims not subject to [Wis. Stat.](#) § 102.29(1).
 - (a) Deduct reasonable collection costs.
 - (b) Distribute balance to claimants.
 - (4) Distribute claims subject to [Wis. Stat.](#) § 102.29(1) as follows:
 - (a) Deduct reasonable collection costs.
 - (b) Allocate one-third to employee's personal representative or other person entitled to bring action.
 - (c) Out of balance, insurance carrier is to be repaid for payments made or obligated to pay.
 - (d) Any funds remaining must be paid to the employee's personal representative or other person entitled to bring action.
8. Crime-victim award. [Wis. Stat.](#) § 949.15.
- a. State subrogated to cause of action in favor of award recipient against person or third parties responsible for injury or death, to extent of award.
 - b. State may commence action.
 - c. Excess recovery paid to award recipient.
9. Underinsured Motorist (UIM) coverage. *Vogt v. Schroeder*, 129 Wis. 2d 3 (1986).
- a. Situation: Tortfeasor has inadequate coverage to cover plaintiff's damages, and plaintiff has UIM coverage; tortfeasor's insurer offers its limits for complete release of tortfeasor and tortfeasor's insurer.
 - b. For actions seeking coverage under UIM policy, the statute of limitation begins to run from the date of loss, which is the date a final resolution is reached against the underlying tortfeasor. *Yocherer v. Farmers Ins. Exch.*, 2002 WI 41, 252 Wis. 2d 114. Offer of tortfeasor's policy limits triggers notice-of-claim requirement. *Shugarts v. Mohr*, 2018 WI 27, 380 Wis. 2d 512.
 - c. Underinsurer entitled to notice of potential settlement (*Vogt* notice); underinsurer can preserve its subrogation rights against tortfeasor by paying plaintiff amount of tortfeasor insurer's limit and any additional amounts paid by the tortfeasor; failure to give *Vogt*

notice does not bar UIM claim unless insurer prejudiced, but rebuttable presumption of prejudice exists. *Pitts v. Revocable Tr. of Knueppel*, 2005 WI 95, 282 Wis. 2d 550; *Ranes v. American Fam. Mut. Ins. Co.*, 219 Wis. 2d 49, 63 (1998).

- d. Failure to preserve subrogation rights against tortfeasor (or insurer) does not bind underinsurer to allocation of damages (compensatory and punitive) negotiated between plaintiff and tortfeasor. *Home Ins. Co. v. Tooke*, 174 Wis. 2d 47 (Ct. App. 1993).
 - e. Underinsurer is not bound by allocation of damages by coplaintiffs if it is not party to that agreement. *Kappus v. United Fire & Cas. Co.*, 229 Wis. 2d 699, 704–06 (Ct. App. 1999).
 - f. Conditional payment by underinsurer does not automatically create subrogation interest that must be litigated by underinsurer to preserve right to reimbursement; underinsurer must plead and prove. *Jindra v. Diedrich Flooring*, 181 Wis. 2d 579 (1994).
10. Medical-insurance payments—UM coverage.
- a. Medical insurer does not have *equitable* right to subrogation interest in UM coverage but may have *contract* right of subrogation if UM policy is so written. *Employers Health Ins. v. General Cas. Co.*, 161 Wis. 2d 937 (1991); *Dailey v. Secura Ins. Co.*, 164 Wis. 2d 624 (Ct. App. 1991).
 - b. UM policies may have reducing clauses. [Wis. Stat.](#) § 632.32(5)(i).
 - c. UM policy’s provision that excludes health insurer’s subrogation claim is void, but *underinsured* policy that excludes might not be void; depends on policy language. *Kulekowskis v. Bankers Life & Cas. Co.*, 209 Wis. 2d 324 (Ct. App. 1997); *Demmer v. American Fam. Mut. Ins. Co.*, 200 Wis. 2d 94, 101–02 (Ct. App. 1996); *WEA Ins. Corp. v. Freiheit*, 190 Wis. 2d 111 (Ct. App. 1994).
11. Employee Retirement Income Security Act of 1974 (ERISA), 29 [U.S.C.](#) §§ 1001–1461, plan payments.
- a. ERISA preempts state laws that relate to employee-benefit plans, but if the ERISA plan is an insured plan under an insurance policy regulated by Wisconsin insurance law, ERISA does not preempt made-whole doctrine. 29 [U.S.C.](#) § 1144; *Kavelaris v. MSI Ins. Co.*, 2001 WI App 161, 246 Wis. 2d 899; *Newport News Shipbuilding Co. v. T.H.E. Ins. Co.*, 187 Wis. 2d 364, 371 (Ct. App. 1994).
 - b. ERISA preempts state law (i.e., *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263 (1982)) if plan is uninsured (i.e., self-funded through employer or employee contribution rather than through purchased private insurance). *Petro v. D.W.G. Corp.*, 148 Wis. 2d 725 (Ct. App. 1989).

NOTE: The attorney *must* determine the type of plan to advise the client regarding settlement (in ERISA cases, the made-whole doctrine ordinarily will not apply). If the plan document is silent on reimbursement, the made-whole doctrine may apply; but reimbursement provisions are enforceable and trump equitable doctrines (e.g., made-whole and common fund). What the plan says and does not say are crucial. *Wal-Mart Stores, Inc. Assocs.’ Health & Welfare Plan v. Wells*, 213 F.3d 398 (7th Cir. 2000); *Palmerton v. Associates’ Health & Welfare Plan*, 2003 WI App 41, 260 Wis. 2d 179; *see*

US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013); *CGI Techs. & Sols. Inc. v. Rose*, 683 F.3d 1113, 1122–24 (9th Cir. 2012), *vacated*, 569 U.S. 945 (2013).

- c. Under federal common law, the right of plan beneficiary to be made whole before plan is reimbursed exists only when parties or plan are silent on issue (when plan administrator has discretion to pursue subrogation, and reasonably does so, subrogation rights are paramount); subrogation language in plan will be studied closely—Wisconsin appeals courts are in conflict as to when to grant substantial deference to plan administrator’s interpretation of plan language. *Bruzas v. Quezada-Garcia*, 2002 WI App 57, 251 Wis. 2d 449; *Newport News*, 187 Wis. 2d at 371–72; *Schultz v. Nepco Emps. Mut. Benefit Ass’n*, 190 Wis. 2d 742 (Ct. App. 1994).
- d. ERISA subrogation right may reach into claimant’s interest in a joint or aggregate recovery. *Johnson v. Ziegler*, 2002 WI App 103, 255 Wis. 2d 751.
- e. Purchase of *stop-loss insurance* (protecting company from catastrophic losses) does not convert uninsured plan to insured (i.e., subject plan to made-whole requirement). *Ramsey Cnty. Med. Ctr., Inc. v. Breault*, 189 Wis. 2d 269 (Ct. App. 1994).

12. Indian Health Care Improvement Act.

Indian Health Service (not individual tribes) may have subrogation rights for payments made, but is subject to made-whole doctrine. 25 [U.S.C.](#) § 1621e; 25 [U.S.C.](#) § 1682; *Houle v. School Dist. of Ashland*, 2003 WI App 214, 267 Wis. 2d 708.

E. Collateral Source Rule [§ 12.451]

1. Collateral source rule is a rule of damages and a rule of evidence. As a damages rule, the rationale is that injured party’s investment in insurance, or receipt of benefits, should not inure to the benefit of the tortfeasor. As a rule of evidence, it precludes introduction of evidence about benefits a plaintiff obtained from sources collateral to the tortfeasor. Public policy is that between injured plaintiff and tortfeasor, plaintiff—not the tortfeasor—should benefit from third-party payments. *Orlowski v. State Farm Mut. Auto. Ins. Co.*, 2012 WI 21, ¶¶ 16–28, 339 Wis. 2d 1; *Ellsworth v. Schelbrock*, 2000 WI 63, 235 Wis. 2d 678; *Campbell v. Sutliff*, 193 Wis. 370, 374–75 (1927), *overruled on other grounds by Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78 (1960); *City of Milwaukee v. NL Indus.*, 2008 WI App 181, ¶¶ 16–20, 315 Wis. 2d 443.
2. Collateral source rule may apply to claims made by insured against its own UIM policy.
3. Sometimes issues develop concerning whether an element of a recovery is subject to subrogated rights or collateral source rules. If subrogated carrier settles its claim for less than the amount it paid to claimant, collateral source rule does not allow claimant to collect the difference from the tortfeasor. But if subrogated carrier waives its subrogation rights and total damages are collected from tortfeasor, the collateral source rule applies. *Fischer v. Steffen*, 2011 WI 34, 333 Wis. 2d 503; *Paulson v. Allstate Ins. Co.*, 2003 WI 99, 263 Wis. 2d 520; *Lambert v. Wrensch*, 135 Wis. 2d 105, 121 (1987); *Blumenfeld v. Jeans*, 2011 WI App 107, 336 Wis. 2d 430.

4. Collateral source rule recognizes inequities involved in reducing negligent defendant's liability by amounts plaintiff receives from independent source. *Petry v. St. Paul Fire & Marine Ins. Co.*, 151 Wis. 2d 343 (Ct. App. 1989).
5. Under collateral source rule, plaintiff may recover full damages from tortfeasor, regardless of whether plaintiff already received compensation for the damages from source other than tortfeasor (e.g., sick leave or disability insurance); however, there may be exceptions. An individual insurer has right to expressly contract to avoid double coverage. When insurer is barred from pursuing subrogation claim, tortfeasor may be entitled to reduction in judgment for the amount of that claim (*Lambert-Koffman* rule). *Fischer v. Steffen*, 2011 WI 34, 333 Wis. 2d 503; *Voge v. Anderson*, 181 Wis. 2d 726 (1994); *Rixmann v. Somerset Pub. Sch.*, 83 Wis. 2d 571 (1978); *Payne*, 54 Wis. 2d 424; *American Standard Ins. Co. v. Cleveland*, 124 Wis. 2d 258 (Ct. App. 1985); *Estate of Otto v. Physicians Ins. Co. of Wis.*, 2007 WI App 192, ¶¶ 31–32, 305 Wis. 2d 198.
6. In medical malpractice actions, evidence of collateral source payments is admissible along with evidence of subrogation obligation; however, such evidence must be relevant. Jury must be instructed that collateral source payments do not reduce award for medical services. In other injury cases, defendants are prohibited—in the absence of a separate basis of release—from introducing evidence of actual payments for purpose of showing that billed expenses were not reasonable. [Wis. Stat.](#) §§ 893.55(7), 908.03(6m); *Weborg v. Jenny*, 2012 WI 67, ¶¶ 7, 62–66, 341 Wis. 2d 668; *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 47, 302 Wis. 2d 110; *Lagerstrom v. Myrtle Werth Hosp.–Mayo Health Sys.*, 2005 WI 124, ¶ 74, 285 Wis. 2d 1; *Koffman v. Leichtfuss*, 2001 WI 111, ¶ 52, 246 Wis. 2d 31.
7. Collateral source rule is most frequently involved with four types of payments: employee benefits, gratuitous payments, some benefits paid by governmental agencies, and benefits paid under plaintiff's insurance policy. It may also involve payments from no-fault insurance coverage, or voluntary payment by insurer; collateral source rule applies to medical assistance payments. It may apply when medical expenses have been written off. *See Orlovski*, 2012 WI 21, ¶ 40, 339 Wis. 2d 1; *Salveson v. Douglas Cnty.*, 2001 WI 100, ¶ 56, 245 Wis. 2d 497; *Ellsworth*, 2000 WI 63, ¶ 22, 235 Wis. 2d 678; *Jindra v. Diederich Flooring*, 173 Wis. 2d 88 (Ct. App. 1992), *aff'd and remanded*, 181 Wis. 2d 579 (1994); *Estate of Holt v. State Farm Fire & Cas. Co.*, 151 Wis. 2d 455, 460–61 (Ct. App. 1989); *Vonch v. American Standard Ins. Co.*, 151 Wis. 2d 138, 143–45 (Ct. App. 1989); McChrystal, *Task Force on Tort Reform Research Paper on Collateral Source Rule*, Wis. Bar Bull., Oct. 1987, at 25.

Chapter 13

Statutes of Limitation

Peter M. Young

Jesse B. Blocher

Habush Habush & Rottier S.C.®

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 174; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-127 (May 16, 2022).

I. INTRODUCTION [§ 13.452]

A. In General [§ 13.453]

1. This chapter collects statutes of limitation affecting the most common causes of action.
2. The statutes cited reflect the most current statutes of limitation; there may have been a different statute operating when the cause of action arose.
3. **This chapter is intended only as a guide and reference to statutory provisions; it does not serve as a substitute for checking the appropriate statute, statutory history, effective date of the statute, and relevant federal and state case law.**
4. Statutes and case law provide more detailed information concerning applicability and exceptions to general limitations.

5. Important cases in this area

- a. Question of law

Cianciola, LLP v. Milwaukee Metro. Sewerage Dist., 2011 WI App 35, ¶ 19, 331 Wis. 2d 740.

- b. Discovery rule

Hansen v. A.H. Robins Co., 113 Wis. 2d 550 (1983).

Borello v. U.S. Oil Co., 130 Wis. 2d 397 (1986).

Kolpin v. Pioneer Power & Light Co., 162 Wis. 2d 1 (1991).

Sopha v. Owens-Corning Fiberglas Corp., 230 Wis. 2d 212 (1999).

Bostco LLC v. Milwaukee Metro. Sewerage Dist., 2011 WI App 76, 334 Wis. 2d 620, *aff'd in part, rev'd in part on other grounds*, 2013 WI 78, 350 Wis. 2d 554.

- c. Continuous-treatment doctrine

Tamminen v. Aetna Cas. & Sur. Co., 109 Wis. 2d 536 (1982).

Clark v. Erdmann, 161 Wis. 2d 428 (1991).

- d. Enterprise-liability theory (market-share liability)

Collins v. Eli Lilly Co., 116 Wis. 2d 166 (1984).

- e. Continuum of negligence

Robinson v. Mount Sinai Med. Ctr., 127 Wis. 2d 285 (Ct. App. 1985), *aff'd*, 137 Wis. 2d 1 (1987).

Wiegert v. Goldberg, 2004 WI App 28, 269 Wis. 2d 695.

B. Accrual of Cause of Action [§ 13.454]

1. Period of limitation within which an action may be commenced is computed from the time cause of action *accrues* until action is commenced. [Wis. Stat.](#) § 893.04.
2. *Barry v. Minahan*, 127 Wis. 570, 573 (1906), provides that claim accrues when there is a
 - a. Claim capable of present enforcement,
 - b. Suable party against whom claim may be enforced, and
 - c. Party who has the present right to enforce the claim.
3. For a discussion of when a cause of action accrues, see *Pufahl v. Williams*, 179 Wis. 2d 104 (1993).

C. Commencement of Action [§ 13.455]

1. Occurs when summons naming defendant and complaint are filed with the court and authenticated copies of both are served within 90 days after filing. [Wis. Stat.](#) § 893.02.
2. Tolls statute of limitation.

NOTE: The statute is not tolled when an action is commenced in a court that lacks jurisdiction and is then refiled in the proper court after the statute of limitation has run. *Schafer v. Wegner*, 78 Wis. 2d 127, 135 (1977).
3. When the law requires that claim be presented to court (e.g., claim against estate of deceased person or claim against guardians or wards), presentation of claim to court commences action. [Wis. Stat.](#) § 893.03.
4. When a statute requires notice to governmental subdivisions, no action will be considered commenced until requirements met. *Colby v. Columbia Cnty.*, 202 Wis. 2d 342, 350–51 (1996).

D. Borrowing Foreign Statutes of Limitation [§ 13.456]

1. A foreign cause of action is an injury received outside Wisconsin. *Guertin v. Harbour Assurance Co. of Bermuda, Ltd.*, 141 Wis. 2d 622, 630 (1987).
2. When a foreign period of limitation might apply, courts will apply the shortest possible limitation period. *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 44, 274 Wis. 2d 220.
3. If action brought in Wisconsin on a foreign cause of action has an expired foreign period of limitation, no action may be maintained in Wisconsin. [Wis. Stat.](#) § 893.07(1).

4. If action brought in Wisconsin on a foreign cause of action has an unexpired period of limitation, but Wisconsin's applicable period has expired, no action may be maintained in Wisconsin. [Wis. Stat.](#) § 893.07(2).
5. Conflict-of-laws analysis is not appropriate when borrowing statute applies. *Guertin*, 141 Wis. 2d at 631–32.
6. Borrowing statute only applies when time and location of “first injury” can be ascertained “to a reasonable, non-speculative degree.” If the place of first injury is unknowable, Wisconsin borrowing statute does not apply. *Paynter v. ProAssurance Wis. Ins. Co.*, 2019 WI 65, ¶ 74, 387 Wis. 2d 278.

E. Tolling and Extending Statutes of Limitation [§ 13.457]

1. Tolling occurs by commencement of an action to enforce a cause of action to which the period of limitation applies. [Wis. Stat.](#) § 893.13(2).
 - a. Tolerated from commencement until final disposition.
 - b. If time remaining for commencement of the action after final disposition is less than 30 days, period extended to 30 days. [Wis. Stat.](#) § 893.13(3).
 - c. Statute of limitation for a cause of action for a defense or counterclaim is tolled until 30 days after final disposition of defense or counterclaim. [Wis. Stat.](#) § 893.14.
2. Extending
 - a. By specific statutory provisions. *Donaldson v. West Bend Mut. Ins. Co.*, 2009 WI App 134, ¶¶ 12–24, 321 Wis. 2d 244.
 - b. Up to one year if the person originally served knowingly gives process server false information and the person had the “intent to mislead the officer” in the performance of the officer’s process-serving duties. [Wis. Stat.](#) § 893.10.
 - c. Up to one year after death if the person entitled to bring action dies before expiration of limitation period and action survives. [Wis. Stat.](#) § 893.22.
 - d. Up to two years after disability ceases when the person entitled to bring action is disabled because the person is under age 18 at the time the cause of action accrues, but this does not apply in actions against health-care providers. [Wis. Stat.](#) § 893.16(1).
 - e. Up to two years after disability ceases when person entitled to bring action is disabled because of mental illness at the time the cause of action accrues, but in no case may period of limitation be extended more than five years.

When person with a disability dies, the statute of limitation for disability, not death, controls. *Walberg v. St. Francis Home, Inc.*, 2005 WI 64, ¶ 5, 218 Wis. 2d 99.

- f. Up to three years if settlement or advanced payment made to injured person. [Wis. Stat. § 893.12](#).

F. Relation Back and Amendments to Pleadings [§ 13.458]

New claims or new defendants may be added in a cause of action already commenced after the limitation period has expired. Amended pleadings will relate back to the date the original pleading was filed if all the following are true:

1. Claim arose out of transaction, occurrence, or event set forth in original pleading. [Wis. Stat. § 802.09\(3\)](#).
2. Amendment adds or changes a party who has received notice of action such that there will be no prejudice in maintaining a defense on the merits.
3. The party knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.
4. The party receives notice by proper service no more than 60 days after statute of limitation expires. *Dakin v. Marciniak*, 2005 WI App 67, ¶ 12, 280 Wis. 2d 491.

NOTE: An amended complaint may relate back to an original complaint although the amendment is filed after the expiration of the statute of limitation. Fed. R. Civ. P. 15(c) mandates relation back and does not leave amendment to the “equitable discretion” of a district court once the rule’s three requirements are met. This is true regardless of whether the plaintiff knew or should have known the identity of the true defendant and regardless of the speed at which the plaintiff moves to amend the complaint after receiving leave to so do. *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 553 (2010).

II. CONTRACT ACTIONS [§ 13.459]

A. In General [§ 13.460]

1. Within six years after cause of action, commence action on
 - a. Breach of contract for sale. [Wis. Stat. § 402.725](#).
 - b. Contract, obligation, or liability. [Wis. Stat. § 893.43\(1\)](#).

Actions on contract include

- (1) Action to recover pension-plan benefits. *Schroeder v. Gateway Transp. Co. (Est. of Schroeder)*, 53 Wis. 2d 59, 67 (1971).
- (2) Action for contribution. *Hartford Fire Ins. Co. v. Osborn Plumbing & Heating, Inc.*, 66 Wis. 2d 454, 461 (1975).
- (3) Action to recover unpaid sales commissions. *Saunders v. DEC Int’l, Inc.*, 85 Wis. 2d 70, 79 (1978).

- (4) Action to recover amounts due under corporation bonus plan. *Younger v. Rosenow Paper & Supply Co.*, 51 Wis. 2d 619, 627 (1971).

NOTE: In *Cianciola, LLP v. Milwaukee Metropolitan Sewerage District*, 2011 WI App 35, 331 Wis. 2d 740, the appellate court held that the six-year statute of limitation for breach of contract did not expire so long as the sewerage district failed to maintain an underground tunnel when the easement contract contained a “good order and condition clause.” The contract was breached in each instance of damage caused by the district’s failure to maintain the tunnel as provided in the contract.

2. Actions on motor vehicle insurance policies including uninsured motorist (UM) and underinsured motorist (UIM) claims are implicated by [Wis. Stat. § 893.43\(2\)](#): “An action upon a motor vehicle insurance policy described in s. 632.32(1) shall be commenced within 3 years after the cause of action accrues or be barred. A cause of action involving underinsured motorist coverage, as defined in s. 632.32(2)(d), or uninsured motorist coverage, as defined in s. 632.32(2)(f), accrues on the date there is final resolution of the underlying cause of action by the injured party against the tortfeasor.” The effective date of [Wis. Stat. § 893.43\(2\)](#) is February 6, 2016, pursuant to 2015 Wis. Act 133 and [Wis. Stat. § 991.11](#). [Wis. Stat. § 893.43\(2\)](#).
3. Within 10 years after cause of action, commence action on any contract not otherwise limited by law. [Wis. Stat. § 893.50](#).
4. Discovery rule does not apply to contract actions. *CLL Assocs. Ltd. P’ship v. Arrowhead Pac. Corp.*, 174 Wis. 2d 604, 617 (1993).
5. The statute of limitation for a subrogated claim is the same as if the claim were not subrogated. *Steadfast Ins. Co. v. Greenwich Ins. Co.*, 2019 WI 6, ¶ 37, 385 Wis. 2d 213.

NOTE: For a discussion of breach of oral contract, see *Servicios Especiales al Comercio Exterior v. Johnson Controls, Inc.*, No. 08-CV-1117, 2011 WL 1304922 (E.D. Wis. Apr. 1, 2011) (unpublished).

6. Statute of limitation for contract action extended if allegedly breaching party makes a new and unqualified promise in writing to perform contract. [Wis. Stat. § 893.45](#).

B. Fair Dealership Law [§ 13.461]

Within one year, commence action on dealership practices under [Wis. Stat. ch. 135](#). [Wis. Stat. § 893.93\(3\)\(b\)](#).

NOTE: In determining whether the statute of limitation has run under [Wis. Stat. ch. 135](#), the focus is not on when the tortious act occurred but on when the plaintiffs were actually or reasonably certain to be injured or when the plaintiffs should have discovered their injury. *See, e.g., Benson v. City of Madison*, 2017 WI 65, ¶¶ 57–60, 376 Wis. 2d 35.

C. Lemon Law [§ 13.462]

Within three years after first delivery of motor vehicle to consumer, consumer may commence action for damages caused by violation of statute. [Wis. Stat. § 218.0171\(7\)\(a\)](#).

D. Personal Services [§ 13.463]

1. Within two years, commence action to recover unpaid salary, wages, or other compensation. [Wis. Stat.](#) § 893.44.
2. If object of contract was fruits of human labor and not human labor alone, six-year limit of [Wis. Stat.](#) § 893.43 applies. *Rupp v. O'Connor*, 81 Wis. 2d 436, 441 (1978).
3. Six-year limitation in [Wis. Stat.](#) § 893.43 applies to contractual claim for wages that claimant would have earned in future. *Lovett v. Mt. Senario Coll.*, 154 Wis. 2d 831, 836 (Ct. App. 1990).

E. Professional Services [§ 13.464]

1. Within six years, commence action to recover fees for professional services. [Wis. Stat.](#) § 893.43.
2. Broad interpretation of *professional services* is in keeping with trend to limit those actions barred by two-year limit of [Wis. Stat.](#) § 893.44. *Lorenz v. Dreske*, 62 Wis. 2d 273, 281 (1974).

NOTE: For failure to pay installment pension payments, a separate limitation period applies for each payment. *Jensen v. Janesville Sand & Gravel Co.*, 141 Wis. 2d 521 (Ct. App. 1987).

III. COURT JUDGMENTS [§ 13.465]

A. Court of Record [§ 13.466]

Within 20 years, commence action on judgment or decree of any U.S. or state court of record. [Wis. Stat.](#) § 893.40.

B. Court Not of Record [§ 13.467]

Within six years, commence action on judgment of court not of record. [Wis. Stat.](#) § 893.42.

IV. FINANCIAL TRANSACTIONS AND GOVERNMENTAL OBLIGATIONS [§ 13.468]

A. Cashier's Checks, Certified Checks, and Money Orders [§ 13.469]

For check or money order made on or after November 2, 1969, commence action within six years. [Wis. Stat.](#) § 893.63(2).

B. Corporations and Banking Associations [§ 13.470]

Under [Wis. Stat.](#) § 893.60, within six years after discovery, commence action against directors or stockholders of corporation or banking association to

1. Recover forfeiture imposed, or
2. Enforce liability created by law.
 - a. *Liability created by law* refers to statutory law. *Gores v. Field*, 109 Wis. 408, 414 (1901).

- b. Breach of fiduciary duty controlled by three-year limitation for intentional torts under [Wis. Stat.](#) § 893.57. *See, e.g., Silverstein v. Amidzich*, No. 2010AP926, 2011 WL 2135624 (Wis. Ct. App. June 1, 2011) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (client against attorney); *Zastrow v. Journal Commc'ns, Inc.*, 2005 WI App 178, ¶ 28, 286 Wis. 2d 416, *aff'd*, 2006 WI 72, 291 Wis. 2d 426 (trustee of employer's trust); *Mews v. Priske*, No. 90-2684, 1991 WL 198151 (Wis. Ct. App. Aug. 29, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (bank officers and directors).
- c. Aiding and abetting breach of fiduciary duty by company that provided kickbacks and bribes controlled by statute of limitation for intentional torts in [Wis. Stat.](#) § 893.57. *S.C. Johnson & Son, Inc. v. Transport Corp. of Am.*, No. 10-C-0681, 2011 WL 4625655 (E.D. Wis. Sept. 30, 2011) (unpublished), *rev'd on other grounds*, 697 F.3d 544 (7th Cir. 2012).

C. Governmental Obligations and Contracts [§ 13.471]

- 1. State. [Wis. Stat.](#) § 893.77(1).
 - a. Within 30 days after adoption of authorizing resolution, commence action to contest validity of any state or state-authority obligation.
 - b. 30-day limit not applicable to constitutional challenges to obligations.
- 2. Municipal
 - a. Obligations under [Wis. Stat.](#) § 893.77
 - (1) Within 30 days after attorney's certificate recorded, commence action to contest validity of any municipal obligation.
 - (2) 30-day limit not applicable to constitutional challenges to obligations.
 - b. Contracts under [Wis. Stat.](#) § 893.75
 - (1) Within 60 days after signing, commence action to contest validity of municipal contract.
 - (2) 60-day limit applies when either party to contract has procured or furnished materials or expended money under terms of contract.
- 3. [Wis. Stat.](#) § 893.61 provides that for governmental subdivision's contract for payment of money, commence action on the following within six years:
 - a. Bond
 - b. Coupon
 - c. Interest warrant
 - d. Other contract for payment of money

D. Securities [§ 13.472]

1. Within the earlier of two years after discovery of facts constituting violations or five years after violation, commence action arising from sale of securities other than for violations of [Wis. Stat.](#) § 551.301. [Wis. Stat.](#) § 551.509(10).
2. Common-law fraud claims are governed by a three-year limitation period in [Wis. Stat.](#) § 893.93(1m)(b). *Esser Distrib. Co. v. Steidl*, 145 Wis. 2d 160 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 64, 71 (1989).
3. *Hansen* discovery rule does not apply to statute of limitation for state securities-law violation. *Esser Distrib. Co.*, 145 Wis. 2d at 170; *see* [Wis. Stat.](#) § 551.509(10); *Hansen v. A.H. Robins Co.*, 113 Wis. 2d 550 (1983).
4. Within the shorter of two years after discovery or five years after the improper transactions, commence action for violation of 15 [U.S.C.](#) § 78j(b). 28 [U.S.C.](#) § 1658(b). Section 1079A(b)(1)(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1862–64 (2010), extended the statute of limitation for criminal prosecutions of the federal securities laws from five years to six years. 18 [U.S.C.](#) § 3301.

E. Usury [§ 13.473]

Within two years after payment of usurious interest, commence action under [Wis. Stat.](#) § 138.06(3) for interest, principal, and charges paid on loan or forbearance. [Wis. Stat.](#) § 893.62.

V. GOVERNMENTAL DECISIONS, ORGANIZATIONS, AND BODIES [§ 13.474]**A. Certain Officials [§ 13.475]**

See [Wis. Stat.](#) § 893.70.

1. Within three years, commence action against any of the following:
 - a. Sheriff,
 - b. Coroner,
 - c. Medical examiner,
 - d. Town clerk, or
 - e. Constable.
2. Limit applies to actions on liability incurred for any of the following:
 - a. Act in official capacity and in virtue of office,
 - b. Omission of official duty, or

- c. Nonpayment of money collected upon execution.
- 3. Limit does not apply to action for escape.

B. Notice of Claim [§ 13.476]

- 1. State officers, employees, or agents. [Wis. Stat.](#) § 893.82(2)(d).
 - a. Within 120 days, serve written notice of claim on attorney general for any civil action or proceeding to be brought against any state officer, employee, or agent. The claim must state time, date, location, and circumstances for injury, damage, or death and names of people involved. [Wis. Stat.](#) § 893.82(3).
 - b. Within time periods under [Wis. Stat.](#) §§ 893.55(1m), (2), (3) and 893.56, serve written notice of claim for medical malpractice on attorney general. [Wis. Stat.](#) § 893.82(5m).
- 2. Governmental bodies, officers, employees, and agents
 - a. Within 120 days, serve written notice of claim for acts done in official capacity or in course of agency or employment. [Wis. Stat.](#) § 893.80(1).
 - b. Within time periods under [Wis. Stat.](#) §§ 893.55(1m), (2), (3) and 893.56, serve written notice of claim for medical malpractice. [Wis. Stat.](#) § 893.80(1m).
 - c. Within one year after discovery of negligent act or omission or after date on which, in exercise of reasonable diligence, negligent act or omission should have been discovered, serve written notice of claim for negligent inspection of property. [Wis. Stat.](#) § 893.80(1p).
 - d. File action within six months after service of disallowance of claim. [Wis. Stat.](#) § 893.80(1g).
 - (1) Six-month limitation period is not triggered when governmental body does not serve notice of disallowance. *Linstrom v. Christianson*, 161 Wis. 2d 635, 642–43 (Ct. App. 1991).
 - (2) Six-month limitation period is not triggered when governmental body fails to personally serve notice of disallowance on claimant by registered or certified mail. *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 16, 300 Wis. 2d 74.
 - (3) Six-month limitation period runs from second notice when first notice is a nullity. *Smith v. Milwaukee Cnty.*, 149 Wis. 2d 934, 940 (1989).

C. Property Assessments and Taxes [§ 13.477]

- 1. Excessive assessments. *See* [Wis. Stat.](#) § 74.37. Pursuant to 2021 Wis. Act 80, if the taxes are paid by October 1, 2020, this does not apply to taxes or installments due and payable in 2020, nor to taxes due and payable in 2021 if paid by October 1, 2021, or by any installment date for which taxes are due after October 1, 2021.

To bring action in counties for an excessive assessment, taxpayer must do all the following:

- a. Ensure all taxes on contested assessment are paid in full and received by the proper official on or before five working days after the due date of January 31. [Wis. Stat.](#) §§ 74.11, 74.12. 2019 Wis. Act 185 provided relief to taxpayers affected by the COVID-19 pandemic. Among other things, real estate taxes are deemed timely paid if remitted by October 1, 2020.
- b. File claim by January 31 of year that tax is payable.
- c. Comply with Board of Review procedures. [Wis. Stat.](#) § 70.47. [Wis. Stat.](#) § 70.47(3)(aL)2. states, “Regardless of whether the 2020 assessment roll is completed at the time of the 45-day period beginning on the 4th Monday of April, the board may publish a class 1 notice under ch. 985 that the board has adjourned and will proceed under sub. (2).”
- d. Commence suit within
 - (1) 90 days after denial of claim, or
 - (2) 90 days after claim is filed if municipality fails to act.

NOTE: [Wis. Stat.](#) § 74.37(6), allowing circuit court action to recover a property tax based on an excessive assessment in a county with a population of less than 500,000 but only permitting certiorari review of assessments in larger counties, has been held unconstitutional. *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 46, 245 Wis. 2d 86. [Wis. Stat.](#) § 74.37(6) was repealed by 2017 Wis. Act 358.

NOTE: All the modifications made by 2007 Wis. Act 86 (amending [Wis. Stat.](#) §§ 74.37(4)(c) and (d), and 70.47(7)(c), (8)(d), (8)(j), (13), (16)(a), and (16)(c)), which provided for “enhanced certiorari procedures” for certain municipalities that opted in to the regulation, were found unconstitutional in *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85. [Wis. Stat.](#) § 74.37(4)(d) was repealed and the other statutory subsections were amended by 2017 Wis. Act 358.

2. Special assessments. [Wis. Stat.](#) § 893.72.

NOTE: The limitations for actions commenced under [Wis. Stat.](#) ch. 893 apply except in situations in which a different limitation is provided by statute. An appeal under [Wis. Stat.](#) § 66.0703(12)(a) and (e), providing a 90-day appeal period for special assessments, is limited to special assessments levied by municipalities under [Wis. Stat.](#) § 66.0703, while [Wis. Stat.](#) § 893.72 applies to all other special assessments generally and provides for a one-year appeal period.

- a. Within one year after notice of assessment, commence action to
 - (1) Avoid any special assessment,
 - (2) Avoid taxes levied under special assessments, or
 - (3) Restrain levy of such taxes or sale of lands for nonpayment of such taxes.

- b. Limit does not apply if any of following are true:
 - (1) Lands are not liable to assessment.
 - (2) City, town, or village has no power to make assessment.
 - (3) Amount of assessment has been paid.
 - (4) Redemption has been made.
- 3. Unlawful taxes. [Wis. Stat.](#) § 74.35. If taxes are paid by October 1, 2020, this does not apply to taxes or installments due and payable in 2020, nor to taxes due and payable in 2021 if paid by October 1, 2021, or by any installment date for which taxes are due after October 1, 2021.
 - a. File claim by January 31 of year tax is payable.
 - b. Pay tax in full (must be received on or before five working days after due date of January 31). [Wis. Stat.](#) §§ 74.11, 74.12, 74.87.
 - c. Commence suit within
 - (1) 90 days after denial of claim, or
 - (2) 90 days after claim is filed if municipality fails to act.

D. State Actions [§ 13.478]

See [Wis. Stat.](#) § 893.87.

- 1. Within 10 years, state must commence any action in its favor unless other [Wis. Stat.](#) ch. 893 limit is prescribed.
- 2. State action for relief on grounds of fraud accrues upon discovery of facts constituting fraud.

E. Relief from a Court Judgment or Order [§ 13.479]

- 1. If relief is sought under [Wis. Stat.](#) § 806.07(1)(a) or (c), a motion must be made within one year after the judgment was entered or stipulation was made.
- 2. If relief is sought under [Wis. Stat.](#) § 806.07(1)(b), a motion may be made at any time within one year after the verdict as set forth in [Wis. Stat.](#) § 805.16(4).

NOTE: Even if a movant brings a claim outside the one-year statute of limitation as provided in [Wis. Stat.](#) § 806.07, a motion can still be granted under [Wis. Stat.](#) § 806.07(1)(h), which permits a court to relieve a party from a judgment or order for any reason that justifies relief. Such a motion is not barred by the one-year limitation period. *Werner v. Hendree*, 2011 WI 10, 331 Wis. 2d 511.

VI. TORT ACTIONS [§ 13.480]

NOTE: The statute of limitation for tort actions, not contract actions, applies to a claim against a purchasing corporation for tort liability of a purchased corporation pursuant to an asset-purchase agreement. *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 2002 WI App 9, ¶ 36, 250 Wis. 2d 582, *rev'd on other grounds*, 2003 WI 38, 261 Wis. 2d 70.

A. Discovery Rule [§ 13.481]

1. Under *Hansen v. A.H. Robins Co.*, 113 Wis. 2d 550, 560 (1983), and *Spitler v. Dean*, 148 Wis. 2d 630, 636 (1989), all tort claims, other than those already governed by legislatively created discovery rule, accrue on earlier of
 - a. Date injury is discovered,
 - b. Date injury should have been discovered with reasonable diligence, or
 - c. Date plaintiff discovers, or with reasonable diligence should have discovered, identity of alleged tortfeasor.
2. Date of discovery is date plaintiff has basis for objectively concluding that defendant's conduct or product was probably the cause of plaintiff's injury. *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 414–15 (1986); *Meracle v. Children's Serv. Soc'y*, 143 Wis. 2d 476 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 19 (1989).
3. Discovery rule will not extend time of accrual of cause of action against state employee-physician until defendant's status as state employee is discovered. *Renner v. Madison Gen. Hosp.*, 151 Wis. 2d 885 (Ct. App. 1989).
4. *Hansen* discovery rule has retroactive effect. *Borello*, 130 Wis. 2d at 421–22.
5. Discovery rule does not apply to contract actions. *CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.*, 174 Wis. 2d 604, 617 (1993).
6. Discovery rule does not apply to [Wis. Stat. § 893.37](#)—six-year limitation for actions against surveyors. *Castellani v. Bailey*, 218 Wis. 2d 245, 249 (1998).
7. Three-year statute of limitation for claim of breach of fiduciary duty of loyalty brought by client against attorney began running on the date a problem with a written agreement was discovered, not on the date the contract was drafted. *Silverstein v. Amidzich*, No. 2010AP926, 2011 WL 2135624 (Wis. Ct. App. June 1, 2011) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

B. Contribution [§ 13.482]

Under [Wis. Stat. § 893.92](#), within one year, commence action for contribution based on tort.

1. Time limit does not apply if right of contribution arises out of prior judgment allocating comparative negligence between parties.

2. Time limit for contribution does not apply to subrogation claims. Such claims are governed by the statute of limitation applicable to the underlying tort. *General Accident Ins. Co. of Am. v. Schoendorf & Sorgi*, 202 Wis. 2d 98, 109–10 (1996).

C. Intentional Torts [§ 13.483]

1. Under [Wis. Stat.](#) § 893.57, within three years, commence action for
 - a. Assault,
 - b. Battery,
 - c. False imprisonment,
 - d. Invasion of privacy,
 - e. Libel,
 - f. Slander, or
 - g. Other intentional tort.
2. Insurer’s bad faith is an intentional tort ([Wis. Stat.](#) § 893.57 applies). *Warmka v. Hartland Cicero Mut. Ins. Co.*, 136 Wis. 2d 31, 36 (1987).
3. Physician’s inappropriate sexual conduct is an intentional tort ([Wis. Stat.](#) § 893.57 applies). *Deborah S.S. v. Yogesh N.G.*, 175 Wis. 2d 436, 445 (Ct. App. 1993).
4. Plaintiff’s claim for inappropriate sexual contact by a physician accrues “on the date of the last physical touching” by the tortfeasor physician, as that is the date that the last “physical injurious change” occurred, regardless of the lack of actual physical manifestation (e.g., cuts, bruises, etc.); claim does not accrue on the date that the plaintiff discovers that the physical touching was itself inappropriate. *Doe 56 v. Mayo Clinic Health Sys.—Eau Claire Clinic, Inc.*, 2016 WI 48, 369 Wis. 2d 351; *see also Moore v. Vagnini*, 673 F. App’x 584 (7th Cir. 2017).
5. Excessive force in arrest is an intentional tort ([Wis. Stat.](#) § 893.57 applies). *Kofler v. Florence*, 216 Wis. 2d 41, 45 (Ct. App. 1997).
6. Knowledge of defendant’s personal distribution of defamatory materials started three-year limitation period under [Wis. Stat.](#) § 893.57. *Krans v. Wicklund*, No. 2010AP489, 2011 WL 321820 (Wis. Ct. App. Feb. 3, 2011) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
7. Malicious prosecution is an intentional tort; three-year statute of limitation under [Wis. Stat.](#) § 893.57 applies rather than the six-year residual statute of limitation under [Wis. Stat.](#) § 893.53. *Turner v. Sanoski*, 2010 WI App 92, 327 Wis. 2d 503.
8. Tortious interference with contractual relationship claim is an intentional tort ([Wis. Stat.](#) § 893.57 applies). *Mirbeau of Geneva Lake, LLC v. City of Lake Geneva*, 746 F. Supp. 2d 1000 (E.D. Wis. 2010); *see also Turner v. Sanoski*, 2010 WI App 92, 327 Wis. 2d 503.

9. Breach of fiduciary duty is an intentional tort under [Wis. Stat.](#) § 893.57. *See, e.g., Silverstein v. Amidzich*, No. 2010AP926, 2011 WL 2135624 (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (client against attorney); *Zastrow v. Journal Commc'ns, Inc.*, 2005 WI App 178, ¶ 28, 286 Wis. 2d 416, *aff'd*, 2006 WI 72, 291 Wis. 2d 426 (trustee of employer's trust); *Mews v. Priske*, No. 90-2684, 1991 WL 198151 (Wis. Ct. App. Aug. 29, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (bank officers and directors).
10. Aiding and abetting breach of fiduciary duty by company that provided kickbacks and bribes is an intentional tort under [Wis. Stat.](#) § 893.57. *S.C. Johnson & Son, Inc. v. Transport Corp. of Am.*, No. 10-C-0681, 2011 WL 4625655 (E.D. Wis. Sept. 30, 2011) (unpublished), *rev'd on other grounds*, 697 F.3d 544 (7th Cir. 2012).

D. Personal Injury [§ 13.484]

1. In general
 - a. Under [Wis. Stat.](#) § 893.54, within three years, commence action to recover damages for
 - (1) Injuries to person; or
 - (2) Death caused by another person's
 - (a) Wrongful act,
 - (b) Neglect, or
 - (c) Default.
 - b. For personal injuries resulting from improvement to real property, see section [13.34](#), *infra*. [Wis. Stat.](#) § 893.89.
2. Automobile wrongful death. [Wis. Stat.](#) § 893.54(2m).
 - a. Pursuant to 2015 Wis. Act 133 and [Wis. Stat.](#) § 893.54(2m), "an action brought to recover damages for death caused by the wrongful act, neglect, or default of another and arising from an accident involving a motor vehicle shall be commenced within 2 years after the cause of action accrues or be barred."
 - b. Pursuant to section 7 of 2015 Wis. Act 133, the new two-year statute of limitation "first applies to accidents that occur on the effective date of this subsection," February 6, 2016.
3. Injury to another person's character or rights. [Wis. Stat.](#) § 893.53.
 - a. Within three years, commence action to recover damages for injury to another person's character or rights not arising from contract.
 - b. Limit does not apply if different period is expressly prescribed.
4. Medical malpractice

a. In general

- (1) Under [Wis. Stat.](#) § 893.55(1m), commence action against health-care provider to recover damages for injury within later of
 - (a) Three years after date of injury, or
 - (b) One year after date of discovery or date injury should have been discovered in exercise of reasonable diligence, except cannot be commenced later than five years after date of act or omission.

NOTE: *Injury* is not defined by statute.

NOTE: Actionable injury arises when there is a physical, injurious change.

- (2) Under [Wis. Stat.](#) § 893.555(2), commence action against long-term care provider to recover damages for injury within the later of
 - (a) Three years from the date of injury, or
 - (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence, should have been discovered, but in any case no later than five years after the date of the act or omission.
- (3) If a long-term care provider conceals from the patient a prior act or omission that resulted in injury to the patient, an action must be commenced within one year after the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided in para. (2)(b), *supra*, whichever is later. [Wis. Stat.](#) § 893.555(3).
- (4) Three-year period set in [Wis. Stat.](#) § 893.55(1)(a) may be extended by the continuous-negligent-treatment rule. *Forbes v. Stoeckl*, 2007 WI App 151, ¶ 14, 303 Wis. 2d 425.
- (5) Five-year repose period in [Wis. Stat.](#) § 893.55(1)(b) is limited to the discovery-accrual rule of that subsection and has no application to injury-accrual rule in [Wis. Stat.](#) § 893.55(1)(a). *Storm v. Legion Ins. Co.*, 2003 WI 120, ¶ 3, 265 Wis. 2d 169.
- (6) [Wis. Stat.](#) § 893.55(1)(b) does not violate constitutional equal protection. *Miller v. Kretz*, 191 Wis. 2d 573, 586 (Ct. App. 1995).
- (7) Operation of [Wis. Stat.](#) §§ 893.55(1)(b) and 893.56 is constitutional even when limitation period expires before claimant is injured or before claimant knew or should have known that he or she was injured. *Aicher v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 6, 237 Wis. 2d 99.
- (8) See section [13.25](#), *supra*, for notice-of-claim procedures for medical malpractice claims against state or a governmental subdivision.

- (9) [Wis. Stat.](#) § 893.55(1) applies to wrongful death claims arising from medical malpractice. *Estate of Hegarty v. Beauchaine*, 2001 WI App 300, ¶ 15, 249 Wis. 2d 142.
- (10) Tolling provisions of [Wis. Stat.](#) § 893.16(1) extend limitation period under [Wis. Stat.](#) § 893.55(1). *Storm*, 2003 WI 120, ¶ 4, 265 Wis. 2d 169.
- b. Blood bank is not a health-care provider. *Doe v. American Nat'l Red Cross*, 176 Wis. 2d 610, 613 (1993).
- c. Chiropractors are health-care providers. *Arenz v. Bronston*, 224 Wis. 2d 507, 515 (Ct. App. 1999).
- d. Optometrists are health-care providers. *Lehnertz v. CUNA Mut. Ins. Soc'y*, No. 03-1397, 2004 WL 193068 (Wis. Ct. App. Feb. 3, 2004) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *Webb v. Ocularra, Inc.*, 2000 WI App 25, 232 Wis. 2d 495.
- e. Dentists are health-care providers. *Ritt v. Dental Care Assocs., S.C.*, 199 Wis. 2d 48, 64 (Ct. App. 1995).
- f. Podiatrists are health-care providers. *Clark v. Erdmann*, 161 Wis. 2d 428 (1991) (“The term ‘health care provider’ ... plainly applies to anyone who professionally provides health care to others.”).
- g. Exceptions
- (1) Under [Wis. Stat.](#) § 893.55(2), if health-care provider conceals from patient act or omission causing injury, commence action within later of the following:
- (a) One year after date concealment is discovered or date concealment should have been discovered in exercise of reasonable diligence, or
- (b) Time limits of [Wis. Stat.](#) § 893.55(1m), *see supra* para. 4.a.
- (2) Under [Wis. Stat.](#) § 893.55(3), if foreign object with no therapeutic or diagnostic purpose or effect has been left in patient’s body, commence action within later of the following:
- (a) One year after patient is aware of presence of object or should have been aware in exercise of reasonable diligence, or
- (b) Time limits of [Wis. Stat.](#) § 893.55(1m), *see supra* para. 4.a.
- (3) Under [Wis. Stat.](#) § 893.56, if patient is under age 18 and not under disability by reason of insanity, developmental disability, or imprisonment, commence action for injury from treatment or operation within later of the following:
- (a) Time person reaches age of 10 years, or
- (b) Time limits of [Wis. Stat.](#) § 893.55, *see supra* paras. 4.a., 4.f.(1), (2).

- (4) If patient is under age 18 and under disability by reason of developmental disability, no statute of limitation applies, but common-law doctrine of laches may be a bar to such claims. *Haferman v. St. Clare Healthcare Found., Inc.*, 2005 WI 171, ¶¶ 60, 61, 286 Wis. 2d 621.
- (5) Doctor's intentional sexual assault and improper touching of a patient is subject to the intentional-tort statute of limitation contained within [Wis. Stat.](#) § 893.57 and is not subject to the medical malpractice statute contained within [Wis. Stat.](#) § 893.55. *Deborah S.S. v. Yogesh N.G.*, 175 Wis. 2d 436, 445 (Ct. App. 1993).

NOTE: If a minor's claim accrued before the enactment of [Wis. Stat.](#) § 893.56, the prior statute of limitation applies. *Bethhauser v. Medical Protective Co.*, 172 Wis. 2d 141, 150–51 (1992).

5. Legal malpractice: Within six years, commence action for legal malpractice. *Acharya v. Carroll*, 152 Wis. 2d 330, 337 (Ct. App. 1989).
6. Engineer malpractice: Within six years, commence action for engineer malpractice. *Milwaukee Partners v. Collins Eng'rs, Inc.*, 169 Wis. 2d 355, 364 (Ct. App. 1992).

NOTE: The cause of action for legal malpractice accrues when damages are incurred, not at the time of the alleged bad advice. *Bleecker v. Cahill*, 2017 WI App 28, 375 Wis. 2d 282. In *Bleecker*, the court of appeals reasoned as follows: “[T]he question for statute of limitations purposes is not whether a suit in 2003 ultimately would have been successful; the question is whether [the client] had a claim at that point that was ‘capable of present enforcement.’ ... [He] did not.” *Id.* ¶ 17.

7. Sexual exploitation by therapist. [Wis. Stat.](#) § 893.585.
 - a. Within three years, commence action to recover damages resulting from sexual contact with therapist.
 - b. If person is unable to bring action against therapist because of effects of contact or as a result of threats, instructions, or statements from therapist, period of inability is not part of three-year period, except time to commence action must not be extended by more than 15 years.
8. Sexual exploitation by member of clergy. [Wis. Stat.](#) § 893.587.

Before plaintiff who was injured as a minor reaches age 35, commence action for sexual exploitation by clergy member.

E. Property Damage [§ 13.485]

NOTE: See 2017 Wis. Act 235, discussed below.

1. Except as provided in [Wis. Stat.](#) § 893.52(2), and in any other case in which a different period is expressly prescribed, an action, not arising on contract, to recover damages for an injury to real or personal property must be commenced within six years after the cause of action accrues or be barred. [Wis. Stat.](#) § 893.52(1).

2. Under [Wis. Stat.](#) § 893.89(1), the *exposure period*, a seven-year timeframe after substantial completion in which to commence action to recover damages for injury to property arising out of defective or deficient improvement to real property, applies to actions commenced against person performing or furnishing any of following:
 - a. Design,
 - b. Land surveying,
 - c. Planning,
 - d. Supervision of construction,
 - e. Materials, or
 - f. Construction of such improvement.

NOTE: A private homeowner-seller is not liable for the negligent construction or repair of the home. *Moore v. Brown*, 170 Wis. 2d 100, 104 (Ct. App. 1992).

NOTE: 2017 Wis. Act 235 was enacted on April 3, 2018, and published on April 4, 2018, and went into effect the day after publication. Among other things, this act changed the language of [Wis. Stat.](#) § 893.89(1) relative to substantial-completion timeframe. For causes of action accruing before the effective date of 2017 Wis. Act 235, the timeframe governing the commencement of action after substantial completion, the deadline was 10 years after substantial completion.

3. Under [Wis. Stat.](#) § 893.89(3)(b), although the “exposure period” is seven years, there is the potential for a three-year sliding extension relative to the commencement of the action in the following scenario: “If as the result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the 5th year and ending on the last day of the 7th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.”

NOTE: 2017 Wis. Act 235 was enacted on April 3, 2018, and published on April 4, 2018, and went into effect the day after publication. Among other things, this act changed the language of [Wis. Stat.](#) § 893.89(3)(b) relative to the 3-year extension. For causes of action accruing *before* the effective date of 2017 Wis. Act 235, the timeframe governing the 3-year extension was the first day of the 8th year, and the last day of the 10th year.

4. [Wis. Stat.](#) § 893.89 does not apply to any of the following:
 - a. Fraud, concealment, or misrepresentation related to defect or deficiency. [Wis. Stat.](#) § 893.89(4)(a).
 - b. Periods of express warranties or guarantees. [Wis. Stat.](#) § 893.89(4)(b).
 - c. Owner or occupier of real property for damages caused by negligence in maintenance, operation, or inspection of improvement. [Wis. Stat.](#) § 893.89(4)(c).

5. Except as provided in [Wis. Stat.](#) § 893.89(4), [Wis. Stat.](#) § 893.89 applies to improvements substantially completed at any time. [Wis. Stat.](#) § 893.89(5).
6. [Wis. Stat.](#) § 893.89 does not affect rights of any person under [Wis. Stat.](#) ch. 102 (worker's compensation, *see infra* § 13.41). [Wis. Stat.](#) § 893.89(6).
7. *Substantial completion* occurs when owner can occupy or use improvement. *Holy Family Catholic Congregation v. Stubenrauch Assocs.*, 136 Wis. 2d 515, 523 (Ct. App. 1987).
8. An action, not arising on contract, to recover damages for an injury to real or personal property that are caused or sustained by, or that arise from, an accident involving a motor vehicle must be commenced within three years after the cause of action accrues or be barred. [Wis. Stat.](#) § 893.52(2) applies to causes of action that accrue on or after the effective date of 2015 Wis. Act 133, February 6, 2016. [Wis. Stat.](#) § 893.52(2).

F. Products Liability [§ 13.486]

1. In any action under [Wis. Stat.](#) § 895.047(5), a defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years. This subsection does not apply to an action based on a claim for damages caused by a latent disease.
2. Importantly, per [Wis. Stat.](#) § 895.047(6), there is an exception to the products-liability statute of repose relative to negligence and breach of warranty claims: "This section does not apply to actions based on a claim of negligence or breach of warranty."

VII. MISCELLANEOUS ACTIONS [§ 13.487]

A. Antitrust [§ 13.488]

NOTE: The notice requirements in [Wis. Stat.](#) § 893.80(1) for commencing an action against a governmental subdivision also are applicable to an antitrust action brought pursuant to [Wis. Stat.](#) § 133.18. *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, 335 Wis. 2d 720.

1. Within six years, commence action for damages or recovery of payments under [Wis. Stat.](#) ch. 133. [Wis. Stat.](#) § 133.18(2).
2. Cause of action accrues under para. 1., *supra*, upon discovery of facts constituting cause of action. [Wis. Stat.](#) § 133.18(4).

B. Bond Sureties [§ 13.489]

1. Under [Wis. Stat.](#) § 878.07(3), within six years after discharge, commence action against sureties on any bond given by
 - a. Personal representative,
 - b. Special administrator,

- c. Guardian, or
 - d. Trustee.
2. Within one year after completion of work under contract for construction of an improvement, commence action against sureties and prime contractor for damages resulting from prime contractor's failure to comply with contract. [Wis. Stat.](#) § 779.14(2)(a).
 - a. Under certain circumstances, for subcontractor or supplier to preserve right to commence action under [Wis. Stat.](#) § 779.14(2)(a), general contractor must receive written notice no later than 60 days after the date on which labor or materials were first provided. [Wis. Stat.](#) § 779.14(2)(am).
 - b. One-year limitation begins to run when all work required by contract has been performed. *Arbor Vitae–Woodruff Joint Sch. Dist. No. 1 v. Gulf Ins. Co.*, 2002 WI App 24, ¶ 13, 250 Wis. 2d 637.

C. Civil Rights Under 42 [U.S.C.](#) § 1983 [§ 13.490]

1. 2017 Wis. Act 235 was enacted on April 3, 2018, and published on April 4, 2018, and went into effect the day after publication. Among other things, this act changed the language of [Wis. Stat.](#) § 893.53 to state that “[a]n action to recover damages for an injury to the character or rights of another, not arising on contract, shall be commenced within 3 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred.”
2. For civil rights causes of action that accrued *before* the effective date of 2017 Wis. Act 235, the old six-year statute presumably will apply. See [Wis. Stat.](#) §§ 990.06, 991.07. For a case brought under the prior version of [Wis. Stat.](#) § 893.53, see *Hemberger v. Bitzer*, 216 Wis. 2d 509, 519 (1998) (applying pre-2017 Wis. Act 235 version of [Wis. Stat.](#) § 893.53, which contained a six-year timeframe).

NOTE: 42 [U.S.C.](#) § 1983 does not provide a specific statute of limitation for actions arising under it. Thus, the applicable statute of limitation for such claims is the residual statute for personal-injury actions under state law, [Wis. Stat.](#) § 893.53. For a detailed discussion, see *Thomas v. Burlingame*, No. 10-C-1073, 2011 WL 3847080 (E.D. Wis. Aug. 26, 2011) (unpublished). Federal civil rights actions under 42 [U.S.C.](#) § 1983 are best characterized as personal-injury actions. *Wilson v. Garcia*, 471 U.S. 261 (1985). The residual or general personal-injury statute of limitation applies to 42 [U.S.C.](#) § 1983 actions. *Owens v. Okure*, 488 U.S. 235 (1989).

D. Condemnation [§ 13.491]

1. Under [Wis. Stat.](#) § 893.93(1m)(a), an action upon a liability created by statute “when a different limitation is not prescribed by law” must be commenced within three years after the cause of action accrues.

NOTE: 2017 Wis. Act 235, which went into effect on April 5, 2018, renumbered the residual statute of limitation (formerly [Wis. Stat.](#) § 893.93(1)(a) (2015–16)) and shortened the applicable limitation period from six years to three years. [Wis. Stat.](#) § 893.93(1m).

2. Trigger for commencing the statute of limitation is the date on which the property was taken. *See, e.g., Krist Oil Co. v. Wisconsin Dep't of Transp.*, No. 2013AP2485, 2014 WL 3714230, ¶ 11 (Wis. Ct. App. July 29, 2014) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

E. Corporate Dissolutions [§ 13.492]

Under [Wis. Stat.](#) § 180.1407, within two years after date of published notice of dissolution, commence action for any right or claim existing before dissolution or any liability incurred before dissolution for or against

1. Corporation,
2. Directors,
3. Officers, or
4. Shareholders.

F. Employment Related [§ 13.493]

1. Discrimination: Within 300 days, file complaint of discrimination, discriminatory practices, unfair honesty testing, or unfair genetic testing with Department of Workforce Development. [Wis. Stat.](#) § 111.39(1).
2. Unfair labor practice: Within one year, file complaint of unfair labor practice with Wisconsin Employment Relations Commission. [Wis. Stat.](#) § 111.07(14).
3. Worker's compensation. [Wis. Stat.](#) § 102.12.
 - a. Provide employer with notice of injury within
 - (1) 30 days after injury, or
 - (2) 30 days after employee knew or should have known of disability and its relation to employment.
 - b. File application for benefits within
 - (1) Two years after injury or death, or
 - (2) Two years after employee or dependent knew or should have known nature of disability and its relation to employment.
4. Under [Wis. Stat.](#) §§ 103.10(13)(b) and 893.96, for Family or Medical Leave Act, commence action for violation within later of
 - a. 60 days after completion of administrative proceeding, including judicial review; or
 - b. 12 months after violation occurred or person should reasonably have known violation occurred.

G. False Advertising [§ 13.494]

See [Wis. Stat.](#) § 100.18(11)(b)3.

1. Within three years after unlawful act or practice, commence action for violation of [Wis. Stat.](#) § 100.18.
2. [Wis. Stat.](#) § 100.18(11)(b)3. is a statute of repose. *Kain v. Bluemound E. Indus. Park, Inc.*, 2001 WI App 230, ¶ 19, 248 Wis. 2d 172.

H. Fraud [§ 13.495]

Within three years after discovery by the aggrieved party of the facts constituting fraud, commence action for relief on grounds of fraud. [Wis. Stat.](#) § 893.93(1m)(b).

NOTE: 2017 Wis. Act 235, which went into effect on April 5, 2018, renumbered former [Wis. Stat.](#) § 893.93(1)(b) to [Wis. Stat.](#) § 893.93(1m)(b), and also changed the fraud statute of limitation from six years to three years.

I. Fraudulent Transfers [§ 13.496]

See [Wis. Stat.](#) § 893.425.

1. Within four years after transfer is made or obligation is incurred, or if later, within one year after discovery is or reasonably could have been made, commence action for debtor's fraudulent transfer made with actual intent to hinder, delay, or defraud creditor. [Wis. Stat.](#) §§ 242.04(1)(a), 893.425(1).
2. Under [Wis. Stat.](#) §§ 242.04(1)(b), 242.05(1), and 893.425(2), within four years after transfer is made or obligation is incurred, commence action for
 - a. Debtor's fraudulent transfer made without receiving reasonably equivalent value, if debtor
 - (1) Was engaged or was about to engage in business or transaction in which the debtor's remaining assets were unreasonably small in relation to business or transactions; or
 - (2) Intended to incur, or believed or reasonably should have believed it would incur, debts beyond ability to pay.
 - b. Debtor's fraudulent transfer made or obligation incurred as to creditor whose claim arose before transfer or obligation, if made without debtor receiving reasonably equivalent value in exchange for transfer or obligation and debtor was insolvent at time or became insolvent because of transfer or obligation.
3. Within one year after transfer is made or obligation is incurred, for debtor's transfer as to creditor whose claim arose before transfer if transfer to insider for antecedent debt, debtor was insolvent at time, and insider had reasonable cause to believe debtor was insolvent. [Wis. Stat.](#) §§ 242.05(2), 893.425(3).

J. Sexual Assault of a Child [§ 13.497]

See [Wis. Stat.](#) § 893.587.

1. Before plaintiff who was injured as a child reaches age 35, commence action for injury caused by sexual assault of child, incest with a child, or sexual assault of student by instructional staff.
2. Discovery rule applies to cause of action for incestuous abuse. *Byrne v. Bercker*, 176 Wis. 2d 1037, 1046 (1993); *Hammer v. Hammer*, 142 Wis. 2d 257, 264 (Ct. App. 1987).
3. In cases of intentional, nonincestuous sexual assault, the statute of limitation begins to run no later than the date of the last sexual assault. *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312 (1997).
4. Statutes of limitation are not tolled by claims of repressed memories. *John Doe I v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 36, 303 Wis. 2d 34.

K. Action on Insurance Policies [§ 13.498]

1. Disability: Within three years from time written proof of loss is required, commence action on disability insurance coverage. [Wis. Stat.](#) § 631.83(1)(b).
2. Fire. [Wis. Stat.](#) § 631.83(1)(a).
 - a. Within 12 months after loss, commence action on fire-insurance policy.
 - (1) *Fire insurance* means property-indemnity insurance for any peril. *Villa Clement, Inc. v. National Union Fire Ins. Co.*, 120 Wis. 2d 140, 145 (Ct. App. 1984).
 - (2) One-year period in [Wis. Stat.](#) § 631.83(1)(a) applies rather than six-year period for contracts generally. *Insurance Co. of N. Am. v. Regent Ins. Co.*, No. 87-0865 (Wis. Ct. App. Dec. 8, 1987) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
 - (3) Advance-payment provisions of [Wis. Stat.](#) § 893.12 do not apply to fire-insurance claims. *Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co.*, 2004 WI App 218, 277 Wis. 2d 274.
 - b. Time limit in para. a., *supra*, applies to certain attached riders and endorsements.
 - c. Mortgagees, not named insureds, not barred by one-year limitation for actions on fire-insurance policy. See *Picus v. Copus*, 127 Wis. 2d 359 (Ct. App. 1985) (holding that appellants' claim related only to proceeds of policy, not to policy itself).
 - d. Time limit does apply to claims for the following:
 - (1) Loss or damage to property,
 - (2) Use of or income from property from any cause, and
 - (3) Separate windstorm- or hail-insurance policies.

3. Property damage

- a. Claims for property damage must be brought within one year after the date of loss.

NOTE: Expiration of the limitation period will not bar a claim if the defendant's conduct is so unfair and misleading as to outweigh the public interest in the statute of limitation, even when a limitation exists under both a statute and the terms of the policy at issue. *Elliot v. General Cas. Co. of Wis.*, No. 2011AP167, 2011 WL 5120370 (Wis. Ct. App. Oct. 27, 2011) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

- b. To assert an equitable estoppel claim, plaintiff must show all the following:
- (1) Defendant engaged in particular conduct before the expiration of the limitation period.
 - (2) Plaintiff reasonably relied on the conduct.
 - (3) As a result of that reliance, plaintiff did not commence an action within a one-year period.
 - (4) After the inducement for delay ceased, plaintiff did not unreasonably delay in bringing the action.
 - (5) Defendant's conduct was so unfair and misleading as to outweigh public's interest in setting a limitation on bringing actions.

4. See section [13.32](#), *supra*, for bad-faith limitation.

L. Organized Crime [§ 13.499]

1. Within six years, commence action under Wisconsin Organized Crime Control Act. [Wis. Stat.](#) § 946.88(1).
2. Within four years, commence action under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 [U.S.C.](#) § 1964(c). *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) (applying 15 [U.S.C.](#) § 15b).
3. Time limit in para. 1., *supra*, for civil action may be extended two years after termination of criminal action.
4. Actions brought in a federal court sitting in Wisconsin pursuant to RICO will be governed by six-year limitation period in [Wis. Stat.](#) § 946.87(1). *Hemmings v. Barian*, 822 F.2d 688 (7th Cir. 1987).

M. Paternity Actions [§ 13.500]

1. Within 19 years after child's date of birth, commence action for establishing paternity. [Wis. Stat.](#) § 893.88.

2. [Wis. Stat.](#) § 893.88 is not unconstitutional. *James A.O. & Janet C.O. v. George C.B. (In re Paternity of James A.O.)*, 182 Wis. 2d 166, 183 (Ct. App. 1994).

N. Actions Against Personal Representatives [§ 13.501]

1. Under [Wis. Stat.](#) § 865.18, within six months after filing of closing statement, commence proceeding to assert rights of interested persons or creditors against personal representative for breach of fiduciary duty.
2. Time limits in [Wis. Stat.](#) § 865.18 do not apply to proceedings for
 - a. Fraud,
 - b. Inadequate disclosure, or
 - c. Misrepresentation.
3. Within three years after decedent's death or one year after time of distribution, file claim to recover from a distributee who is liable to pay the claim. [Wis. Stat.](#) § 865.19.

O. Victim's Compensation Claim [§ 13.502]

See [Wis. Stat.](#) § 949.08(1).

1. Within five days, report incident or offense to police.
2. Within one year after date of personal injury or death, apply for award.

P. Certified Public Accountant Malpractice [§ 13.503]

1. Within six years after date of negligent act or omission, commence action under any legal theory against certified public accountant licensed or certified under [Wis. Stat.](#) ch. 442 for professional malpractice. [Wis. Stat.](#) § 893.66(1).

NOTE: The discovery rule does not apply to a statute of repose such as [Wis. Stat.](#) § 893.66(1). *Osowski v. Howard*, No. 2010AP2260, 2011 WL 4916924, ¶ 13 n.4 (Wis. Ct. App. Oct. 18, 2011) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

2. Limitation period is extended one year if damage occurs during sixth year of limitation period. [Wis. Stat.](#) § 893.66(1m).
3. More restrictive statute of limitation for specific damages supersedes six-year limitation. [Wis. Stat.](#) § 893.66(2).
4. [Wis. Stat.](#) § 893.66(1) does not apply to the following:
 - a. Actions subject to [Wis. Stat.](#) § 551.509(10) or 553.51(4). [Wis. Stat.](#) § 893.66(3).
 - b. Person who commits fraud or concealment. [Wis. Stat.](#) § 893.66(4).

Q. Conspiracy [§ 13.504]

Within three years after commission of conspiracy to injure business, commence action for damages. [Wis. Stat.](#) §§ 134.01, 893.93(1m)(a).

R. Real Estate—Easement [§ 13.505]

See [Wis. Stat.](#) § 893.33(6), (6m).

1. Actions to enforce easements set forth in any recorded instrument are barred unless the underlying instrument was recorded within the applicable statute of limitation.
2. For easements recorded before July 1, 1980, the statute of limitation is 60 years.
3. For easements recorded on or after July 1, 1980, the statute of limitation is 40 years.
4. Property owner with an expired easement could not enforce that easement against any subsequent purchaser, regardless of whether the purchaser had actual notice of the easement. *TJ Auto LLC v. Mr. Twist Holdings LLC*, 2014 WI App 81, ¶¶ 1, 5, 355 Wis. 2d 517.
5. [Wis. Stat.](#) § 893.33(6m) creates exceptions to the 40-year recording requirement for certain recorded access easements.

Chapter 14

Lemon Law Litigation

Lawrence Alan Towers

Lawrence Alan Towers Law Office
Milwaukee

NOTE: This chapter examines Wisconsin’s lemon law (also known as *lemon law III* or the new lemon law), as amended by 2013 Wis. Act 103, which applies to all motor vehicles or motorized wheelchairs for which the express warranty commences on or after March 1, 2014.

NOTE: Unless otherwise indicated, all references to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2022, No. 795; all references to the Wisconsin Jury Instructions—Civil are to the 2022 supplement; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-111 (Apr. 13, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 22,428 (Apr. 14, 2022).

I. INTRODUCTION [§ 14.506]**A. In General [§ 14.507]**

Wisconsin's lemon law provides remedies for new motor vehicles and motorized wheelchairs that do not conform to the manufacturer's express warranty. The lemon law is not dependent on or qualified by the Uniform Commercial Code. *Herzberg v. Ford Motor Co.*, 2001 WI App 65, 242 Wis. 2d 316.

B. Resources [§ 14.508]

1. [Wis. Stat.](#) § 218.0171.
2. Legislative history file, 1985 Wis. Act 205, Wisconsin Legislative Reference Bureau.
3. Online legislative history for Wisconsin Assembly Bill 200 (2013–14 Sess.) (enacted as 2013 Wis. Act 101): <https://docs.legis.wisconsin.gov/2013/proposals/ab200>.
4. [Wis. Admin. Code](#) §§ ATCP 132.02 and ATCP 132.03 give a consumer the right to receive copies of repair orders from the dealer.
5. Towers, *Lemon Law Litigation*, 39 Am. Jur. Trials 1 (1989); Towers, *Lemon Law Litigation*, 23 Trial 74 (Dec. 1987); Towers, *Lemon Law Trials*, 25 Trial 22 (Feb. 1989); Towers, *Statutory Attorney's Fees*, Wis. Law., Nov. 1989, at 19.
6. See Bob Cohen, Annotation, *Award of Attorney's Fees Under State Motor Vehicle Warranty Legislation (Lemon Laws)*, 82 A.L.R.5th 501 (2000); Patricia C. Kussmann, Annotation, *Validity, Construction and Effect of State Motor Vehicle Warranty Legislation (Lemon Laws)*, 88 A.L.R.5th 301 (2000).
7. LEXIS/Westlaw: Lemon w/5 Law.
8. Website: Wis. Dep't of Transp., *Lemon Law*, <https://wisconsin.gov/Pages/dmv/cons-protect/lemon-law/lemonlaw.aspx> (last visited Apr. 18, 2022).

II. COVERAGE [§ 14.509]

A. Motor Vehicles [§ 14.510]

1. *Motor vehicle* means “any motor driven vehicle required to be registered under [[Wis. Stat.](#)] ch. 341.” [Wis. Stat.](#) § 218.0171(1)(d).
 - a. Includes cars, vans, pickup trucks, motorcycles, motor homes, semi-trucks, and other heavy trucks.
 - (1) The lemon law refers to heavy trucks as *heavy-duty vehicles*, defined as vehicles that weigh more than 10,000 pounds. See [Wis. Stat.](#) § 218.0171(1)(bt).
 - (2) The lemon law provides longer notice response periods for heavy-duty vehicles. [Wis. Stat.](#) § 218.0171(2)(cg)2.; see also *infra* § [14.10](#).
 - b. Includes demonstrators and executive-driven vehicles. [Wis. Stat.](#) § 218.0171(1)(d).

- c. Does not include used motor vehicles, even if purchased within the first year placed in service by their first owners. *Schey v. Chrysler Corp.*, 228 Wis. 2d 483 (Ct. App. 1999).
- d. Does not include mopeds or trailers or semitrailers designed for use in combination with a truck or truck tractor. [Wis. Stat.](#) § 218.0171(1)(d).

B. Motorized Wheelchairs [§ 14.511]

Under a separate statute, [Wis. Stat.](#) § 134.87, Wisconsin law applies all lemon law protections and remedies to motorized wheelchairs (effective for wheelchairs sold after November 1992).

C. Consumers [§ 14.512]

See generally [Wis. Stat.](#) § 218.0171(1)(b) (defining *consumer*).

1. *Consumer* includes anyone who purchases a new motor vehicle or motorized wheelchair from an authorized dealer in Wisconsin, as long as the purchaser has not sold the vehicle before asserting a lemon law claim. *Smyser v. Western Star Trucks Corp.*, 2001 WI App 180, ¶¶ 6–16, 247 Wis. 2d 281.

NOTE: This does not include purchaser of a vehicle from a dealer in another state, delivered in the other state, but titled in Wisconsin. *LaMont v. Winnebago Indus., Inc.*, 569 F. Supp. 2d 806 (E.D. Wis. 2008); see also *Linehan v. PACCAR, Inc.*, No. 20-CV-718-jdp, 2021 WL 5299237 (W.D. Wis. Nov. 15, 2021) (slip copy), *appeal filed* (7th Cir. Dec. 10, 2021).

NOTE: The *LaMont* court distinguished the facts in that case from those in *Begalke*, in which the court held that a vehicle was covered by Wisconsin’s lemon law when the dealer-salesperson had come to Wisconsin and the buyers had signed the purchase contract and paid the down payment in Wisconsin, even though the vehicle was delivered in Minnesota. *Begalke v. Sterling Truck Corp.*, 437 F. Supp. 2d 847, 850 (W.D. Wis. 2006).

2. Consumer may also be anyone who leases a new motor vehicle or motorized wheelchair from an authorized dealer in Wisconsin, as long as the consumer has not exercised a lease-purchase option before providing the [Wis. Stat.](#) § 218.0171(2)(c) or (cg) statutory notice to the manufacturer. *Varda v. General Motors Corp.*, 2001 WI App 89, 242 Wis. 2d 756.

D. Manufacturers [§ 14.513]

See generally [Wis. Stat.](#) § 218.0171(1)(c) (defining *manufacturer*).

1. Any entity that manufactures, assembles, imports, or distributes motor vehicles or motorized wheelchairs or provides a warranty for a new motor vehicle. [Wis. Stat.](#) § 218.0171(1)(c); see also [Wis. Stat.](#) § 134.87(1)(f).
2. Does not include dealers (see [Wis. Stat.](#) § 218.0101(23)(a) for definition of *motor vehicle dealer*).
3. Assembler of the entire vehicle is responsible for the entire vehicle even if manufacturer expressly denies warranty coverage of component part. Component-part manufacturer is not responsible to vehicle manufacturer for lemon law damages under theories of contribution or

indemnity. *Goudy v. Yamaha Motor Corp., USA*, 2010 WI App 55, 324 Wis. 2d 441; *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, 261 Wis. 2d 769; *Harger v. Caterpillar, Inc.*, 2000 WI App 241, 239 Wis. 2d 551; *Malone v. Nissan Motor Corp.*, 190 Wis. 2d 436 (Ct. App. 1994); *see also Begalke v. Freightliner LLC*, 480 F. Supp. 2d 1146 (W.D. Wis. 2007).

III. PRECONDITIONS TO FILING CIVIL ACTION [§ 14.514]

A. Statutory Notice [§ 14.515]

1. After requisites for liability have occurred, see sections [14.16–20](#), *infra*, the consumer must provide to the manufacturer a lemon law notice, and the manufacturer then must provide the statutory remedy as follows:
 - a. Non-heavy-duty vehicles—refund: Within 30 days after receipt of the notice, the manufacturer must provide the refund to the consumer. Must actually refund money, not just agree to refund money. [Wis. Stat.](#) § 218.0171(2)(c); *James Michael Leasing Co. v. PACCAR, Inc.*, 772 F.3d 815, 821 (7th Cir. 2014).
 - b. Non-heavy-duty vehicles—replacement vehicle: Within 30 days after receipt of the notice, the manufacturer must provide a written agreement to the consumer that it will, within 45 days after receipt of the lemon law notice, provide the new, comparable vehicle or a refund. If a new, comparable vehicle cannot be located for timely delivery with due diligence, the manufacturer may instead provide a refund. [Wis. Stat.](#) § 218.0171(2)(cg)1.
 - c. Heavy-duty vehicles: Within 30 days after receipt of the notice, the heavy-duty vehicle manufacturer must provide a written agreement to the consumer that it will, within 120 days after receipt of the lemon law notice, provide the new, comparable vehicle or a refund. If with due diligence a new, comparable vehicle cannot be located for timely delivery, the heavy-duty vehicle manufacturer may instead provide a refund. [Wis. Stat.](#) § 218.0171(2)(cg)2.

Lemon law statute provides a formula that creates a ceiling for a “reasonable allowance for use.” [Wis. Stat.](#) § 218.0171(2)(b)2.b. If manufacturer and consumer cannot agree on a figure for use, manufacturer must make a choice: pay the amount demanded by the consumer within 30 days or pay the amount it believes is appropriate within that time and risk violating the law if the court disagrees. *James Michael Leasing Co. v. PACCAR, Inc.*, 772 F.3d 815, 822 (7th Cir. 2014).

- d. Statutory deadlines with which manufacturer must comply—30, 45, 120 days—will be strictly construed by courts. Any challenge by a manufacturer that it complied with the applicable statutory deadline is forfeited if not made before trial. [Wis. Stat.](#) § 218.0171(2)(c); *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 987 (1996); *see Chariton v. Saturn Corp.*, 2000 WI App 148, 238 Wis. 2d 27 (holding that consumer’s “refusal to sign a general release” as condition for lemon law remedy “did not excuse” manufacturer from time requirement; i.e., no conditions, no excuses); *see also Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, ¶ 10, 341 Wis. 2d 119 (recognizing affirmative defense if manufacturer proves by clear and convincing evidence that consumer intentionally interfered with its effort to provide lemon law remedy).
- e. Consumer must elect on the notice form either a new, comparable vehicle or a refund. If the consumer elects a remedy other than a new, comparable vehicle or a refund, the

manufacturer has no duty to clarify which specific remedy. [Wis. Stat.](#) § 218.0171(8)(a)2., 3. *But see* [Wis. Stat.](#) § 218.0171(7)(b) (providing duty to cooperate).

- f. When the claim is based on 30 days out of service, the defect need not exist when the consumer gives notice to the manufacturer. *Hartlaub v. Coachmen Indus., Inc.*, 143 Wis. 2d 791, 801 (Ct. App. 1988). When the claim is based on four unsuccessful repair opportunities, it is unclear whether the warranty nonconformity must persist thereafter.

2. Notice contents

- a. Notice must be made on the form created by the DOT, which must make the form available on the DOT website. Use DOT Form MV2691. [Wis. Stat.](#) § 218.0171(8)(b). *See generally* Wis. Dep't of Transp., *Forms*, <https://wisconsindot.gov/Pages/global-footer/formdocs/default.aspx> (last visited Apr. 18, 2022) (follow hyperlinks to lemon law forms under “Vehicle registration” heading). The consumer must provide the following information on or with the notice form:

- (1) Consumer’s contact information;
- (2) Identity of the selling dealer, date of delivery of the vehicle, and the purchase price of the vehicle;
- (3) Identification of any lien holder;
- (4) Mileage on the vehicle at the first report of a nonconformity;
- (5) Election of replacement or refund remedy; and
- (6) Itemization of other damages.

- b. If such information is not provided on or with the notice form, the manufacturer may, within 30 days after receipt of the notice form, request the missing information; the time periods under [Wis. Stat.](#) § 218.0171(2)(c), (cg)1. and 2. are tolled until the manufacturer receives the missing information. [Wis. Stat.](#) § 218.0171(8)(c).

- 3. No requirement that the consumer give the manufacturer additional opportunity to repair the vehicle or wheelchair after notice given.
- 4. No requirement that the consumer give the manufacturer notice of intent to sue.
- 5. If the manufacturer fails to provide either a full refund or a replacement vehicle within applicable time period after the consumer’s lemon law demand, the consumer is entitled to the remedies set forth in sections [14.21–25](#), *infra*. Courts strictly interpret these deadlines. [Wis. Stat.](#) § 218.0171(7); *Chariton v. Saturn Corp.*, 2000 WI App 148, 238 Wis. 2d 27; *Gosse*, 2000 WI App 8, 232 Wis. 2d 163; *Church*, 221 Wis. 2d 460; *see also Mercedes-Benz USA, LLC v. Hinkley*, No. 2017AP1467, 2018 WL 3519938 (Wis. Ct. App. July 17, 2018) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)); *BCR Trucking, LLC v. PACCAR, Inc.*, 2009 WI App 36, 316 Wis. 2d 465.

EXAMPLE: Timely delivery of the buyback check to the dealer rather than to the consumer did not satisfy the applicable deadline. *Estate of Riley v. Ford Motor Co.*, 2001 WI App 234, ¶ 8,

248 Wis. 2d 193.

EXAMPLE: The manufacturer cannot issue one check and expect the consumer to pay off a lien. *Marquez v. Mercedes-Benz USA, LLC*, 2008 WI App 70, 312 Wis. 2d 210.

6. The manufacturer cannot insist on a release or receipt of information concerning the vehicle's condition when meeting the lemon law notice period. *Herzberg v. Ford Motor Co.*, 2001 WI App 65, 242 Wis. 2d 316; *Chariton*, 2000 WI App 148, 238 Wis. 2d 27; *see also BCR Trucking*, 2009 WI App 36, ¶ 10, 316 Wis. 2d 465.
7. During the applicable lemon law notice period, the consumer must not intentionally interfere with the manufacturer's effort to provide a refund or replacement vehicle. The consumer can, however, "negotiate[] up until the deadline without sacrificing [the] right to recover statutory remedies." *Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, ¶ 100, 341 Wis. 2d 119; *Marquez v. Mercedes-Benz USA, LLC*, 2008 WI App 70, 312 Wis. 2d 210.

B. Arbitration Prerequisite [§ 14.516]

See generally [Wis. Stat.](#) § 218.0171(3).

1. If the motor vehicle manufacturer offers an arbitration program that complies with [Wis. Admin. Code](#) ch. Trans 143, the consumer must first submit the dispute to nonbinding arbitration.

NOTE: The Better Business Bureau's AUTO LINE arbitration program is available for owners of vehicles made by many manufacturers, including General Motors, Ford Motor Company, Nissan, Mazda, Volkswagen, Hyundai, and Audi. The National Center for Dispute Settlement (NCDS) has arbitration programs for Acura, Fiat Chrysler, Honda, Lexus, Mitsubishi, Tesla, and Toyota. *See* Nat'l Ctr. for Dispute Settlement, <https://www.ncdsusa.org/> (last visited Apr. 18, 2022). A complete list of participants can be found online at <https://bbbprograms.org/programs/all-programs/bbb-autoline> (last visited Apr. 18, 2022). BMW, Mercedes, and Volvo, for example, do not participate in the Wisconsin arbitration program. For the present status of a motor vehicle manufacturer's program certification, call the Wisconsin DOT at (608) 266-0765.

- a. Manufacturers have allowed arbitration decisions to be binding on manufacturers, but not on consumers.
- b. Details of programs may be found in the manufacturer's warranty materials and in the manufacturer's program summary available from arbitration mechanism.

NOTE: Attorney fees and costs may be available to enforce an arbitration decision in court. *Conlan v. General Motors Corp.*, 520 N.Y.S.2d 139, 140 (1987).

2. The consumer may, but need not, submit to the motor vehicle manufacturer's own uncertified arbitration program.
3. Arbitration is not required to resolve disputes regarding motorized wheelchairs.

IV. PROCEDURAL ISSUES [§ 14.517]

A. Jurisdiction [§ 14.518]

Jurisdiction is proper in

1. Any state court of general jurisdiction, Wis. Const. art. VII, § 8;
2. Small claims court, if the award will be less than \$10,000, [Wis. Stat.](#) § 799.01(1)(d); or
3. Federal court based on diversity jurisdiction (requires that damages exceed \$75,000 but can include attorney fees), 28 [U.S.C.](#) § 1332(a); *see also Hart v. Schering-Plough Corp.*, 253 F.3d 272 (7th Cir. 2001); *Jeffries v. Silvercup Bakers, Inc.*, 434 F.2d 310, 312 (7th Cir. 1970); *Batts Rest., Inc. v. Commercial Ins. Co. of Newark*, 406 F.2d 118, 120 (7th Cir. 1969).

B. Venue in State Court [§ 14.519]

1. Actions must be brought in the county where the
 - a. Claim arose, [Wis. Stat.](#) § 801.50(2)(a);
 - b. Motor vehicle or motorized wheelchair is situated, [Wis. Stat.](#) § 801.50(2)(b); or
 - c. Manufacturer does substantial business, [Wis. Stat.](#) § 801.50(2)(c).
2. If provisions in [Wis. Stat.](#) § 801.50(2)(a)–(c) do not apply, then venue is in any county designated by the plaintiff. [Wis. Stat.](#) § 801.50(2)(d).

C. Jury Trial Right [§ 14.520]

Harvot v. Solo Cup Co., 2009 WI 85, 320 Wis. 2d 1, held that there is no implied jury trial right in actions brought under Wisconsin’s Family or Medical Leave Act. The dissent questioned whether the *Harvot* holding might be extended to other acts, so that there would also be no jury trial right under Wisconsin’s lemon law. *Id.* ¶¶ 94–95, 97 (Bradley, A.W., J., dissenting).

V. LIABILITY [§ 14.521]**A. Period of Protection [§ 14.522]**

See generally [Wis. Stat.](#) § 218.0171(1)(h), (2)(a).

1. In general

All defective conditions must occur and be reported to the manufacturer or authorized dealer within the earlier of

- a. One year after date of first delivery to the first consumer, or
- b. Before the expiration of the written warranty period.

NOTE: Motor vehicle manufacturers’ almost universal expansion of warranties to at least

three years or 36,000 miles effectively makes the period of protection for motor vehicles one year after the date of delivery in most cases.

2. Statute of limitation

Actions must be commenced within 36 months after first delivery of the motor vehicle to the consumer. [Wis. Stat.](#) § 218.0171(7)(a).

B. Substantial Warranty Nonconformity [§ 14.523]

See generally [Wis. Stat.](#) § 218.0171(1)(f); *Malone v. Nissan Motor Corp.*, 190 Wis. 2d 436 (Ct. App. 1994).

1. Nonconformity must exist (or have existed) that

- a. Is covered by an express warranty; however, nonconformity is covered even if excluded from manufacturer's warranty, *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, 261 Wis. 2d 769; but see *Goudy v. Yamaha Motor Corp., USA*, 2010 WI App 55, ¶¶ 15–16, 324 Wis. 2d 441 (conditioning liability on defendant's actual manufacture, distribution, sale, or supply of parts that failed);
- b. May be known to consumer at delivery, *Dieter v. Chrysler Corp.*, 229 Wis. 2d 481 (Ct. App. 1999), *rev'd*, 2000 WI 45, 234 Wis. 2d 670; and
- c. Constitutes substantial impairment of vehicle or wheelchair's
 - (1) Use,
 - (2) Value, or
 - (3) Safety.

NOTE: The consumer need not prove the precise mechanical cause of the defect but only that the condition existed. *Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.*, 2002 WI App 138, 256 Wis. 2d 205; *Universal Motors, Inc. v. Waldock*, 719 P.2d 254, 259 (Alaska 1986).

NOTE: Use of the vehicle by the consumer does not preclude a finding that its use was substantially impaired. *Dobbratz*, 2002 WI App 138, 256 Wis. 2d 205; see also [Wis. JJ—Civil 3301](#).

2. Substantial-impairment factors include the following:

See generally Lee R. Russ, *What Constitutes "Substantial Impairment" Entitling Buyer to Revoke His Acceptance of Goods Under UCC § 2-608(1)*, 38 A.L.R.5th 191 (1996).

- a. How vital the affected component is to vehicle's or wheelchair's operation, value, or safety (e.g., most impairments of any part of drive train's operation would clearly be considered substantial, whereas defects in trim items or annoying rattles might not be considered substantial);

- (1) Even minor impairments of the vehicle's or wheelchair's safe operation should be considered substantial; some other states' lemon laws give manufacturers only one chance to repair safety defects.
 - (2) Because Wisconsin's law includes nonconformities that substantially impair only *value*, certain substantial cosmetic defects should satisfy the substantial-impairment requirement (e.g., defective paint job that requires substantial portion of vehicle to be repainted).
- b. Period of time or number of times it took to repair the vehicle or wheelchair (in excess of statutory requisites);
 - c. Total warranty reimbursement cost to repair nonconformity;
 - d. Price at which the vehicle or wheelchair was resold is evidence of impairment of value, *Countryside Mobile Homes, Inc. v. Schade*, 281 N.W.2d 756, 758 (Neb. 1979);
 - e. Degree to which the consumer's confidence in the integrity of the vehicle or wheelchair was subjectively and objectively undermined; and
 - f. Defects, if considered collectively (and if Uniform Commercial Code is applied), *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406 (1978).

CAUTION: Mere "driveability" (i.e., that the vehicle or wheelchair was driveable or was operated for substantial number of miles when nonconformity existed) is *not* determinative. *Dobbratz*, 2002 WI App 138, 256 Wis. 2d 205; *Chmill v. Friendly Ford-Mercury, Inc.*, 144 Wis. 2d 796 (Ct. App. 1988); *Vultaggio v. General Motors Corp.*, 145 Wis. 2d 874, 887 (Ct. App. 1988).

3. Nonconformity does not include a condition that is
 - a. A defect not covered by the manufacturer's warranty (e.g., one caused by aftermarket item, as in *Malone*, 190 Wis. 2d 436);

NOTE: *Aftermarket* equipment means equipment that is purchased after taking delivery of the vehicle or that was installed before delivery but is not covered by the manufacturer's warranty.
 - b. Characteristic of a particular vehicle or wheelchair (e.g., heavy steering on a vehicle without power steering or poor acceleration of a vehicle with small, four-cylinder engine);
 - c. Caused by incorrect operation (e.g., transmission grinding caused by consumer's failure to fully depress clutch pedal); or
 - d. The result of the consumer's
 - (1) Abuse,
 - (2) Neglect, or

- (3) Unauthorized modification or alteration of the vehicle or wheelchair. [Wis. Stat. § 218.0171\(1\)\(f\)](#).

NOTE: The manufacturer has the burden of proving affirmative defenses that the consumer's abuse, neglect, or unauthorized modification or alteration actually caused the nonconformity. *Bucky's Portable Toilets, Inc. v. Navistar, Inc.*, No. 2012AP2075, 2013 WL 4555876, ¶¶ 28–29 (Wis. Ct. App. Aug. 29, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

4. Proof of existence of substantial nonconformity:
- a. Expert testimony is unnecessary when the existence and substantiality of condition or defect is “within the area of common knowledge and lay comprehension.” *Vultaggio*, 145 Wis. 2d at 882.
 - b. Expert testimony is necessary when the existence or substantiality of condition or defect is “outside the realm of the ordinary experience of mankind, and requires special learning, study or experience.” *Id.*

C. Repair [§ 14.524]

See generally *Kletzien v. Ford Motor Co.*, 668 F. Supp. 1225, 1229 (E.D. Wis. 1987).

1. If [Wis. Stat. § 218.0171\(2\)\(a\)](#) is violated, the consumer is entitled to repair under [Wis. Stat. § 218.0171\(2\)\(a\)](#) and remedies provided in [Wis. Stat. § 218.0171\(7\)](#) if, within the statutory period of protection, the
 - a. Consumer makes substantial warranty nonconformity available for repair to the manufacturer or authorized dealer, and
 - b. Manufacturer or dealer “has not, cannot, or will not repair” warranty nonconformity. *Vultaggio v. General Motors Corp.*, 145 Wis. 2d 874, 891 (Ct. App. 1988).

NOTE: [Wis. Stat. § 218.0171\(2\)\(a\)](#) creates a violation separate from [Wis. Stat. § 218.0171\(2\)\(b\)](#), with different requirements and different remedies. However, a [Wis. Stat. § 218.0171\(2\)\(a\)](#) claim is viable only if a [Wis. Stat. § 218.0171\(2\)\(b\)](#) claim cannot be established. *Dussault v. Chrysler Corp.*, 229 Wis. 2d 296, 306–08 (Ct. App. 1999).

2. If [Wis. Stat. § 218.0171\(2\)\(b\)](#) is violated, the consumer is entitled to remedies provided in [Wis. Stat. § 218.0171\(2\)\(b\)](#) and (7) if, within statutory period of protection,
 - a. Substantial warranty nonconformity is made available for repair at least four times and nonconformity continues, or
 - b. The motor vehicle or motorized wheelchair is out of service for total of 30 or more days in the aggregate because of one or more substantial warranty nonconformities. See [Wis. Stat. § 218.0171\(1\)\(h\)](#) (defining *reasonable attempt to repair*).

NOTE: The consumer makes a vehicle available for repair by taking it to a repair facility

approved by manufacturer even if not an authorized dealer. *Burzloff v. Thoroughbred Motorsports, Inc.*, 758 F.3d 841, 846–47 (7th Cir. 2014).

NOTE: Notice must be sufficient to enable the dealer to attempt to repair the nonconformity. “30 days” means 30 calendar days, not business days or weekdays. *Carl v. Spickler Enters.*, 165 Wis. 2d 611, 619–20 (Ct. App. 1991); *Kletzien v. Ford Motor Co.*, 668 F. Supp. 1225, 1229 (E.D. Wis. 1987); *Bents v. Fleetwood Motorhomes of Ind., Inc.*, No. 95-2437, 1996 WL 145916 (Wis. Ct. App. Apr. 2, 1996) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

NOTE: *Out of service* means that the vehicle is unable to be used by the consumer for the vehicle’s intended purpose as a result of either of the following: (1) the vehicle is in the possession of the manufacturer, motor vehicle lessor, or any of the manufacturer’s authorized motor vehicle dealers for the purpose of performing or attempting repairs to correct a nonconformity; or (2) the vehicle is in the consumer’s possession and the vehicle has a nonconformity that substantially affects the use or safety of the vehicle and that has been subject to repair under [Wis. Stat. § 218.0171\(2\)\(a\)](#) on at least two occasions. [Wis. Stat. § 218.0171\(1\)\(g\)](#).

NOTE: The 30-day period does not include time during which repair services are not available to the consumer because of natural disasters, war, invasion, fire, or strike. [Wis. Stat. § 218.0171\(1\)\(h\)2](#).

3. Successful repair of the vehicle or wheelchair before trial
 - a. May be relevant when liability is based on four unsuccessful repair attempts (no definitive decision on this issue yet, *cf. Kletzien*, 668 F. Supp. 1225, 1229 (“[I]t does not appear that the [consumers’] car required repair of a condition or repair four times without success...”), but
 - b. Is irrelevant when liability is based on 30 days out of service, *Hartlaub v. Coachmen Indus., Inc.*, 143 Wis. 2d 791, 801 (Ct. App. 1988); *see also supra* § [14.10](#), para. A.1.f.

NOTE: For additional discussion, see Nicks, *Lemon Law II*, Wis. Bar Bull., July 1987, at 8, 49 n.5 (commenting that legislature’s 1986 replacement of “cannot be repaired” statutory language with phrase “is not repaired” was “a clarification and not a substantive change”).

4. Whether a violation of [Wis. Stat. § 218.0171\(2\)\(a\)](#) or (b), the consumer need only make the vehicle or wheelchair available for repair to the manufacturer, authorized dealer, or other repair facility. *Chmill v. Friendly Ford-Mercury, Inc.*, 144 Wis. 2d 796 (Ct. App. 1988).
 - a. Nonconformity need not be discovered or verified by the manufacturer or dealer.
 - b. No repairs need actually be attempted.
 - c. If consumer notifies dealer of nonconformity and makes vehicle available for repair, no formal demand to repair need be made and no repair record need be created. *Barth v. Ford Motor Co.*, No. 2013AP2338, 2014 WL 2503750 (Wis. Ct. App. June 4, 2014) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

NOTE: Consumers need not use DOT Form MV2692 in connection with repairs. 2015 Wis.

Act 173, § 2 (repealing [Wis. Stat.](#) § 218.0171(8)(a)1. (2013–14)).

D. Ownership [§ 14.525]

1. It is not clear whether the vehicle or wheelchair must be owned or leased by the consumer at any time after satisfying the statutory requirements of prima facie case and providing [Wis. Stat.](#) § 218.0171(2)(c) or (cg) statutory notice; it is possible that the consumer may sell, trade, or otherwise dispose of the vehicle or wheelchair before or after commencing the action. *See generally Hartlaub v. Coachmen Indus., Inc.*, 143 Wis. 2d 791, 795 (Ct. App. 1988).
2. However, when the vehicle or wheelchair is traded or resold, it appears that “pecuniary loss” is the difference between purchase price and trade or resale price. *See generally Smyser v. Western Star Trucks Corp.*, 2001 WI App 180, 247 Wis. 2d 281; *Varda v. General Motors Corp.*, 2001 WI App 89, 242 Wis. 2d 756; *Hartlaub*, 143 Wis. 2d 791.

VI. REMEDIES [§ 14.526]

See generally Nicks, A New Twist on Lemon Law, Wis. Law., Oct. 1991, at 23.

A. [Wis. Stat.](#) § 218.0171(2)(a) Violation [§ 14.527]

1. [Wis. Stat.](#) § 218.0171(2)(a) claim is only available when [Wis. Stat.](#) § 218.0171(2)(b) claim cannot be proved. *Dussault v. Chrysler Corp.*, 229 Wis. 2d 296 (Ct. App. 1999).
2. Valuing pecuniary loss
 - a. When the consumer owns the vehicle or wheelchair as of the date of trial, pecuniary loss includes all money actually paid toward purchase, including finance interest and loan balance, but does not include rebates. *Hughes v. Chrysler Motors Corp.*, 188 Wis. 2d 1 (Ct. App. 1994), *aff'd*, 197 Wis. 2d 973 (1996); *see also Church v. Chrysler Corp.*, 221 Wis. 2d 460 (Ct. App. 1998). *See generally Nick v. Toyota Motor Sales, U.S.A., Inc.*, 160 Wis. 2d 373, 383–84 (Ct. App. 1991).
 - b. When the consumer leases the vehicle or wheelchair, pecuniary loss includes only amounts the consumer has paid under the lease and does not include the remaining obligations under the lease. *Estate of Riley v. Ford Motor Co.*, 2001 WI App 234, 248 Wis. 2d 193.

If the consumer exercises the option to purchase the vehicle under terms of the lease, after bringing an action under [Wis. Stat.](#) § 218.0171(7), the consumer is not entitled to damages for the price of the voluntary purchase because the manufacturer’s violation of the lemon law did not “cause” the purchase. *Tammi*, 2009 WI 83, ¶ 2, 320 Wis. 2d 45.

- c. When the vehicle or wheelchair is sold or traded before trial, pecuniary loss is the difference between the purchase price, including finance interest and resale or trade price, minus setoff, *see infra* § 14.23, para. 1.b.(2). *See generally Hartlaub v. Coachmen Indus., Inc.*, 143 Wis. 2d 791, 795 (Ct. App. 1988).
- d. In case of either para. a. or b., *supra*, pecuniary loss also includes any collateral costs incurred in connection with the unsuccessful repair of nonconformity, including the costs

of obtaining alternative transportation incurred during attempts to repair. *See generally Nick*, 160 Wis. 2d at 384–86.

3. Reimbursement of collateral costs includes only those costs incurred in connection with repair, not those costs incurred for a subsequently obtained vehicle or wheelchair. *See generally Nick*, 160 Wis. 2d at 384–86; *Hellenbrand v. Hilliard*, 2004 WI App 151, 275 Wis. 2d 741.
4. Attorney fees, costs, and disbursements. [Wis. Stat.](#) § 218.0171(7); *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 154 Wis. 2d 407 (Ct. App. 1990) (on remand); *Hughes*, 188 Wis. 2d 1, *aff'd*, 197 Wis. 2d 973 (1996); *see also Natzke v. PACCAR, Inc.*, No. 17-C-637, 2019 WL 1499725 (E.D. Wis. Apr. 5, 2019) (unpublished). *See generally Towers, Statutory Attorney's Fees*, Wis. Law., Nov. 1989, at 19.
 - a. Standard of review is erroneous exercise of discretion.
 - b. Award includes both trial and appellate litigation fees, costs, and disbursements.
 - c. Award of attorney fees, costs, and disbursements to prevailing consumer is mandatory. *Hartlaub*, 143 Wis. 2d at 804.
 - d. Court should award attorney fees even for time spent on unsuccessful claims if the prevailing party achieved substantial success and the unsuccessful claims were brought and pursued in good faith. *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 550 (Ct. App. 1991).
 - e. Courts have sometimes awarded lodestar multiplier when cases were taken at least partially on contingent-fee basis. *See, e.g., Chrysler Corp. v. Weinstein*, 522 So. 2d 894, 896 (Fla. Dist. Ct. App. 1988).
 - f. In a Civil Rights Act case, the U.S. Supreme Court approved using the current market rate for attorney fees rather than the rates applicable when the attorney's services were rendered. *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989).
 - g. Mediated compromise settlement that stipulated that circuit court would decide attorney fees supported court's decision that "both sides won" and that plaintiff should be awarded only half of attorney fees sought. *Kauffmann v. Volkswagen Grp. of Am., Inc.*, 2010AP823, 2010 WL 5372534 (Wis. Ct. App. Dec. 29, 2010) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
 - h. Retainer agreement must clearly provide that the consumer assigns to the consumer's attorney the right to recover from the manufacturer reasonable attorney fees, costs, and disbursements. If manufacturer and consumer settle dispute without the attorney's participation, consumer's attorney has no right to attorney fees without an assignment of the attorney fees by the consumer in the retainer agreement and notice to the manufacturer of that assignment. *Betz v. Diamond Jim's Auto Sales*, 2014 WI 66, 355 Wis. 2d 301.
 - i. Courts must apply a rebuttable statutory presumption that attorney fees greater than three times compensatory damages are unreasonable. [Wis. Stat.](#) § 814.045.
5. Equitable relief when appropriate. [Wis. Stat.](#) § 218.0171(7).

6. Prejudgment interest on liquidated amounts. *Murray v. Holiday Rambler*, 83 Wis. 2d 406, 438 (1978); *see also BCR Trucking, LLC v. PACCAR, Inc.*, 2009 WI App 36, ¶ 19 n.7, 316 Wis. 2d 465.

B. [Wis. Stat. § 218.0171\(2\)\(b\) Violation \[§ 14.528\]](#)

1. Under [Wis. Stat. § 218.0171\(2\)\(b\)](#), consumer has choice of either of the following:
 - a. Comparable new motor vehicle or motorized wheelchair, or
 - (1) Choice does not permit any setoff for use of vehicle by consumer, *see infra* para. b. *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 144 Wis. 2d 796 (Ct. App. 1988).
 - (2) If the comparable new motor vehicle or motorized wheelchair is a newer model year, there should be no additional cost to consumer.
 - (3) Manufacturer can substitute refund if new comparable vehicle cannot be located and provided within applicable periods. [Wis. Stat. § 218.0171\(2\)\(cg\)](#); *see supra* § [14.10](#), paras. A.1.b. & c.
 - (4) Not clear whether manufacturer may substitute a replacement vehicle of a different color. *Dussault v. Chrysler Corp.*, 229 Wis. 2d 296, 309–10 (Ct. App. 1999).
 - (5) Demonstrator and executive-driven vehicles are covered by lemon law, but manufacturer can replace vehicle with comparable demonstrator or executive-driven vehicle if replacement remedy elected by consumer. *Dussault*, 229 Wis. 2d at 301–06.
 - (6) *Comparable new motor vehicle* includes both manufacturer’s chassis and non-manufacturer’s tow package on tow truck. *Kiss v. General Motors Corp.*, 2001 WI App 122, 246 Wis. 2d 364.
 - (7) Consumer should be able to remove easily removable aftermarket items, but if manufacturer insists items remain, new vehicle or wheelchair should be comparably equipped.
 - (8) If consumer requests replacement vehicle but does not accept replacement when timely offered by manufacturer, and court later orders refund, then manufacturer is entitled to depreciation setoff for miles that consumer placed on original vehicle after date on which manufacturer proposed vehicle exchange. *BCR Trucking, LLC v. PACCAR, Inc.*, 2009 WI App 36, 316 Wis. 2d 465.
 - b. Refund of purchase price.

NOTE: The consumer-lessor is entitled to only a refund; no replacement-vehicle remedy is available.

 - (1) Plus all the following:

(a) Sales tax;

NOTE: The manufacturer (or, in some cases, consumer) is entitled to a refund of sales tax from the Wisconsin Department of Revenue. [Wis. Stat. § 218.0171\(2\)\(e\)](#).

(b) Finance charges actually incurred, including any penalties for early termination of note;

(c) All other point-of-sale items, including license and title fees, and dealer-installed options; and

(i) Refund of purchase price, including price of original equipment or aftermarket items dealer added to vehicle or wheelchair before delivery because these are amount(s) “paid by the consumer at the point of sale,” [Wis. Stat. § 218.0171\(2\)\(b\)2.](#); *Bucky’s Portable Toilets, Inc. v. Navistar, Inc.*, No. 2012AP2075, 2013 WL 4555876, ¶¶ 44–47 (Wis. Ct. App. Aug. 29, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)); and

(ii) Value added to vehicle or wheelchair by all post-sale aftermarket items that cannot be removed may be refunded pursuant to equitable relief provisions, [Wis. Stat. § 218.0171\(7\)](#).

(d) Any collateral costs incurred in connection with repair of nonconformity, including costs of obtaining alternative transportation in connection with repair. However, cost of alternative transportation during pendency of litigation is not recoverable. *Nick v. Toyota Motor Sales, U.S.A.*, 160 Wis. 2d 373, 384–86 (Ct. App. 1991).

(2) Minus setoff (reasonable allowance for use of vehicle).

(a) Formula for motor vehicle setoff: Not to exceed purchase price multiplied by mileage at first report of defect divided by 100,000 miles (20,000 miles if motorcycle).

NOTE: The statutory formula for the mileage offset creates a ceiling and not a safe harbor. In instances in which the useful life of a vehicle is substantially more than 100,000 miles, applying a statutory formula might result in an excessive mileage offset. See *James Michael Leasing Co. v. PACCAR, Inc.*, 772 F.3d 815, 823 (7th Cir. 2014); *Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶¶ 53–56, 320 Wis. 2d 45. The court of appeals affirmed a circuit court finding that the useful life of a heavy truck was 300,000 miles. *Klismet’s 3 Squares Inc. v. Navistar, Inc.*, 2016 WI App 42, ¶¶ 21–32, 370 Wis. 2d 54 (interpreting [Wis. Stat. § 218.0171](#) (2011–12)).

(b) Formula for wheelchair setoff: Not to exceed purchase price multiplied by number of days used before first repair divided by 1,825. [Wis. Stat. § 134.87\(3\)\(b\)2.b.](#)

(c) Formula applies only to miles on vehicle at first report of defect; no setoff for post-report miles.

2. The following forms of relief are also available:
 - a. Reimbursement of collateral costs;
 - b. Attorney fees, costs, and disbursements, *see supra* § [14.22](#), para. 4., [Wis. Stat.](#) § 218.0171(7); *see also* *Hughes v. Chrysler Motors Corp.*, 188 Wis. 2d 1 (Ct. App. 1994), *aff'd*, 197 Wis. 2d 973 (1996);
 - c. Prejudgment interest on liquidated amounts, *Murray v. Holiday Rambler*, 83 Wis. 2d 406, 438 (1978); and

NOTE: Common-law five-percent prejudgment interest applies only to compensatory damages and not to attorney fees. *Nick*, 160 Wis. 2d at 386–87.

NOTE: The manufacturer must provide the consumer with a remedy within the applicable period after the lemon law notice is received. [Wis. Stat.](#) § 218.0171(2)(c), (cg); *see also* *Church v. Chrysler Corp.*, 221 Wis. 2d 460 (Ct. App. 1998).

- d. Equitable relief when appropriate, [Wis. Stat.](#) § 218.0171(7); *Chmill*, 154 Wis. 2d 407.
3. Personal-injury damages caused by nonconformity are *not* recoverable under lemon law. *Gosse v. Navistar Int'l Transp. Corp.*, 2000 WI App 8, 232 Wis. 2d 163.

C. Leased Vehicles [§ 14.529]

See generally [Wis. Stat.](#) § 218.0171(2)(b)3.

1. Consumer is refunded all moneys paid under lease, including all sales taxes and collateral costs minus reasonable allowance for use, but not including the current value of the written lease or the consumer's cost of purchasing the vehicle under the terms of the lease. *Estate of Riley v. Ford Motor Co.*, 2001 WI App 234, 248 Wis. 2d 193; *see Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, 320 Wis. 2d 45. Aftermarket equipment might be compensable as a "pecuniary loss" depending on the facts. *Tammi*, 2009 WI 83, ¶ 51 n.20, 320 Wis. 2d 45.
2. Lessor and any lienholder are paid amount owing on lease because of early termination.
3. Lessor's attempts to collect on lease after consumer has tendered title and received lemon law remedy from the manufacturer violate lemon law, entitling consumer to attorney fees, costs, and disbursements after consumer's action has compelled lessor to stop its illegal collection efforts. *Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, 335 Wis. 2d 566.
4. Lessee also entitled to all remedies under [Wis. Stat.](#) § 218.0171(7), including attorney fees.

D. Affirmative Defenses and Manufacturer's Remedies [§ 14.530]

1. Negotiated written settlement: For heavy-duty vehicles, if the consumer entered into a negotiated written settlement with the manufacturer, the manufacturer will not be subject to the lemon law with respect to that vehicle (except for full-disclosure requirements for future sale or lease under [Wis. Stat.](#) § 218.0171(2)(d)). [Wis. Stat.](#) § 218.0171(6m).

2. Breach of duty to cooperate: If the consumer failed to reasonably cooperate with the manufacturer's efforts to comply with its obligations, the court may extend deadlines; reduce damages, attorney fees, or costs that might be awarded; strike pleadings; or enter default judgment. [Wis. Stat.](#) § 218.0171(7)(b). Middle burden of proof—clear and convincing evidence—applies to proof that consumer intentionally prevented manufacturer from compliance within 30-day period. *Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, ¶ 10, 341 Wis. 2d 119.
3. Defective component: A manufacturer may have a remedy against the component-part manufacturer for a defective component that it did not manufacture or warrant and that is a basis for lemon law liability, but the remedy is limited to the value of the defective component. In the absence of a contract, a manufacturer cannot recover damages it paid to the consumer. *Begalke v. Sterling Truck Corp.*, 480 F. Supp. 2d 1146, 1155 (W.D. Wis. 2007).

VII. OTHER CLAIMS [§ 14.531]

A. Federal Claims: Magnuson-Moss Warranty-FTC Improvement Act [§ 14.532]

See generally 15 [U.S.C.](#) §§ 2301–2312.

1. The \$50,000 jurisdictional amount in controversy for a cognizable claim in federal court under 15 [U.S.C.](#) § 2310(d)(3)(B) can be satisfied by including accrued attorney fees. *Burzloff v. Thoroughbred Motorsports, Inc.*, 758 F.3d 841, 844–45 (7th Cir. 2014).
2. Attorney fees are only discretionary under Magnuson-Moss Warranty-FTC Improvement Act, 15 [U.S.C.](#) §§ 2301–2312; 16 [C.F.R.](#) pts. 700–703. *Carl v. Spickler Enters.*, 165 Wis. 2d 611, 626–27 (Ct. App. 1991).

B. State Statutory Claims [§ 14.533]

1. Breach of warranty. See generally [Wis. Stat.](#) §§ 402.313, 402.607.
 - a. Consumer must give notice that enables seller “to make adjustments or replacements or to suggest opportunities for cure” before commencing litigation. *Carl v. Spickler Enters.*, 165 Wis. 2d 611, 621–22, 624 (Ct. App. 1991).
 - b. Measure of damages is difference between the fair market value of goods as accepted and the fair market value of goods as warranted. *Lightcap v. Steenberg Homes, Inc.*, 160 Wis. 2d 607, 617–20 (1991).
 - c. Breach of warranty does not entitle a prevailing plaintiff to attorney fees under [Wis. Stat.](#) § 218.17(3) (mobile homes).
2. Revocation of acceptance (against dealer). [Wis. Stat.](#) § 402.608.
3. Failure of essential purpose of warranty. [Wis. Stat.](#) § 402.719.

C. Common-Law Claims [§ 14.534]

1. Misrepresentation
2. Fraud
3. Products liability

NOTE: A personal-injury claim must be pleaded separately from a lemon law claim. *Gosse v. Navistar Int'l Transp. Corp.*, 2000 WI App 8, 232 Wis. 2d 163.

NOTE: Joining additional claims has certain potentially unattractive consequences; for example, ultimate repair before trial is irrelevant under [Wis. Stat. § 218.0171\(2\)\(b\)](#), when the vehicle or wheelchair was out of service 30 days, yet might be relevant and admissible evidence at trial in [Wis. Stat. § 402.608](#) and [Wis. Stat. § 402.719](#) claims.

Chapter 15

Bankruptcy

Roy L. Prange, Jr.
Brittany S. Ogden
Quarles & Brady LLP
Madison

NOTE: The authors recognize Randy J. Pflum of Quarles & Brady LLP for his assistance in preparing this chapter.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 159; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-92 (Mar. 10, 2022); and all references to the Federal Rules of Bankruptcy Procedure are current through Mar. 11, 2022.

I. INTRODUCTION—BANKRUPTCY CODE [§ 15.535]

A. In General [§ 15.536]

1. Bankruptcy provides an honest, financially distressed debtor with the opportunity for a fresh start.
2. The commencement of a voluntary case constitutes an *order for relief* and, upon commencement, an *automatic stay* goes into effect to prohibit creditors from pursuing claims unless done through the bankruptcy proceeding or after the stay is terminated. 11 [U.S.C.](#) § 301; 11 [U.S.C.](#) § 362.
3. Assets are marshaled under jurisdiction of bankruptcy court; bankruptcy estate is distributed to creditors according to priority and equity.

4. Four primary types of proceedings
 - a. Chapter 7: Debtor's nonexempt assets liquidated; proceeds paid to creditors. 11 [U.S.C.](#) §§ 701–784.
 - b. Chapter 11: Debtor reorganizes business, pays debts over period of time per court-approved reorganization plan. 11 [U.S.C.](#) §§ 1101–1174.

NOTE: Effective February 19, 2020, qualifying small businesses can reorganize under Subchapter V. 11 [U.S.C.](#) §§ 1181–1195.
 - c. Chapter 12: *Family farmer* or *family fisherman* debtor reorganizes. 11 [U.S.C.](#) §§ 1201–1232.
 - d. Chapter 13: Individual debtor with regular income pays creditors per court-approved plan (primarily involves consumer debts). 11 [U.S.C.](#) §§ 1301–1330.
5. Creditors may invoke involuntary bankruptcy against debtor to protect against dissipation of assets or payments to other creditors. 11 [U.S.C.](#) § 303.
 - a. Some exceptions (e.g., farmers, noncommercial corporations). 11 [U.S.C.](#) § 303(a).
 - b. If there are 12 or more creditors, at least 3 must have claims that aggregate at least \$16,750 and that are not the subject of a bona fide dispute as to liability or amount. 11 [U.S.C.](#) § 104; 11 [U.S.C.](#) § 303(b)(1).
 - c. If there are fewer than 12 creditors, one or more must have claims that aggregate at least \$16,750. 11 [U.S.C.](#) § 104; 11 [U.S.C.](#) § 303(b)(2).
 - d. Test is generally whether debtor is paying debts when they come due. 11 [U.S.C.](#) § 303(h).
 - e. These dollar limitations, as well as others contained in the Code, became effective April 1, 2022, and are adjusted every three years. 11 [U.S.C.](#) § 104.
6. May convert from one chapter to another under certain circumstances.

B. Resources [§ 15.537]

1. Bankruptcy Reform Act of 1978, as amended, 11 [U.S.C.](#) §§ 101–1532 (Bankruptcy Code), including Bankruptcy Amendments and Federal Judgeship Act of 1984, Bankruptcy Judges, United States Trustees, Family Farmer Bankruptcy Act of 1986 (FFBA), Bankruptcy Reform Act of 1994, and Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA); Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (enacted March 27, 2020, sunset March 27, 2021); COVID-19 Bankruptcy Relief Extension Act of 2021 (extended sunset date of certain CARES Act provisions to March 27, 2022); Bankruptcy Rules and Official Forms (“Rule(s)” or “Form(s)”); and local rules (Eastern and Western Districts of Wisconsin). Note that substantial amendments to Rules and Forms were enacted effective December 1, 2014, December 1, 2016, December 1, 2017, December 1, 2018, and December 1, 2021. Links to the Forms are available at <https://www.uscourts.gov/forms/bankruptcy-forms>

(last visited Apr. 5, 2022). Forms have also been amended to reflect dollar limitations changes such as those described in section I.A.5., *supra*.

BAPCPA is the most significant amendment to the Bankruptcy Code since its enactment.

NOTE: As of the date this chapter went to print, Congress had not indicated any plans to extend the terms of the CARES Act beyond March 27, 2022.

2. Bankruptcy cases reported in West’s Bankruptcy Reporter; Bankruptcy Court Decisions; Collier Bankruptcy Cases, Second Series; WESTLAW; LEXIS. Cases also reported in Federal Reporter system.
3. Consult Wisconsin Statutes. Relevant statutes include the following:
 - a. Uniform Commercial Code. [Wis. Stat.](#) chs. 401–411.
 - b. Exemptions. [Wis. Stat.](#) §§ 425.106, 815.18, 815.20.
 - c. Uniform Fraudulent Transfer Act. [Wis. Stat.](#) ch. 242.
 - d. Marital Property Act. [Wis. Stat.](#) ch. 766.
4. Treatises and forms
 - a. *Collier on Bankruptcy* (16th ed. 2009 & Supp. 2021).
 - b. *Bankruptcy Service*, Lawyer’s ed. (1985 & Supp. 2021).
 - c. W. Norton, Jr., *Norton Bankruptcy Law and Practice 3d* (2008 & Supp. 2021).
 - d. R. Ginsberg & R. Martin, *Ginsberg & Martin on Bankruptcy* (6th ed. 2021).
 - e. Randall D. Crocker et al., *No Small Change: The Bankruptcy Abuse Prevention and Consumer Act of 2005* (State Bar of Wis. 2005).
5. Check the Bankruptcy Court websites for local rules, forms, and other information. See this website for access: <https://bkinformation.com/CourtWebs.cfm> (last visited Apr. 5, 2022).
6. Preprinted petition/schedule-related forms available from law office supply companies.
7. Contact clerk of bankruptcy court regarding local filing requirements.
8. Determine whether Chapter 11 case has “case management” order governing procedure (generally in large cases only).
9. PACER (Public Access to Court Electronic Records)—allows user to access bankruptcy court clerk’s office and view general case information, docket information, and claims; call court for access details. See <https://bkinformation.com/CourtWebs.cfm> (last visited Apr. 5, 2022) for access to court PACER sites.

10. VCIS (Voice Case Information System)—allows telephone access to the bankruptcy court’s computer that communicates, by synthesized voice, information on case filing, debtor counsel, and deadlines; call court for access details.
11. Check Case Management/Electronic Case Filing (CM/ECF) Administrative Procedures. The Bankruptcy Court for the Eastern District of Wisconsin’s next generation of CM/ECF went live on March 1, 2021. *See* U.S. Bankr. Ct. E. Dist. Wis., *NextGen CM/ECF*, <https://www.wieb.uscourts.gov/nextgen-cmecf> (last visited Apr. 5, 2022). The Bankruptcy Court for the Western District of Wisconsin’s next generation of CM/ECF went live on March 30, 2020. *See* U.S. Bankr. Ct. W. Dist. Wis., *NextGen*, <https://www.wiwb.uscourts.gov/nextgen> (last visited Apr. 5, 2022).
12. All filings (e.g., petitions, pleadings, orders, correspondence, and documents) must be filed electronically with the Bankruptcy Court for the Eastern District of Wisconsin. The Bankruptcy Court for the Western District of Wisconsin permits paper filings but encourages electronic filing. Training is available from both courts.

II. JURISDICTION [§ 15.538]

A. Federal District Courts [§ 15.539]

1. Original and exclusive jurisdiction of all cases under Title 11. 28 [U.S.C.](#) § 1334(a).
2. Original but not exclusive jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11. 28 [U.S.C.](#) § 1334(b).
3. Court may abstain from considering certain matters. 28 [U.S.C.](#) § 1334(c).
4. Court has exclusive jurisdiction of all property of debtor and estate. 28 [U.S.C.](#) § 1334(e).

B. Bankruptcy Court [§ 15.540]

1. Cases referred to bankruptcy court as a unit of district court. 28 [U.S.C.](#) § 151; 28 [U.S.C.](#) § 157.
2. Bankruptcy judges consider cases under Title 11 and *core proceedings*. 28 [U.S.C.](#) § 157(b).
 - a. Core proceedings include traditional bankruptcy matters. 28 [U.S.C.](#) § 157(b)(2).
 - b. Bankruptcy judge decides whether core matter exists either on own motion or on timely motion of party. 28 [U.S.C.](#) § 157(b)(3).
3. May consider *noncore proceedings* (related proceedings—personal injury/wrongful death claims, etc.). 28 [U.S.C.](#) § 157(b), (c).

NOTE: In *Stern v. Marshall*, 564 U.S. 462 (2011), the U.S. Supreme Court held that the Bankruptcy Court could not enter final orders with respect to certain matters, which often involve state-law-based claims but might also include core matters.

In *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25 (2014), the Supreme Court decided that if the matter must be determined by a district court judge pursuant to article III of

the U.S. Constitution, the bankruptcy court cannot decide the matter but can only recommend a decision to the district court, which must perform a de novo review of the record. Under Rule 8018.1, if, on appeal, a district court determines that the bankruptcy court did not have the authority under Article III of the U.S. Constitution to enter an order, judgment, or decree appealed from, the district court may treat the order, judgment, or decree as proposed findings of fact and conclusions of law.

In *Wellness International Network, Ltd. v. Sharif*, 575 U.S. 665 (2015), the Supreme Court held that bankruptcy judges are permitted by article III of the U.S. Constitution to adjudicate *Stern* claims if the parties waive any objection to the bankruptcy court doing so. Such consent need not be express, but must be knowing and voluntary.

III. OVERVIEW OF BANKRUPTCY PROCEEDING [§ 15.541]

A. Effect of BAPCPA on Consumer Bankruptcies [§ 15.542]

1. BAPCPA was enacted primarily to curb abuses by both debtors and creditors in consumer bankruptcy cases; however, it addresses business bankruptcy issues as well.
2. The heart of the reforms was the implementation of *means testing*, intended to compel debtors to repay creditors the maximum amount debtors can afford. 11 [U.S.C.](#) § 707(b)(2).
3. Debtor's consumer case may be dismissed or converted to Chapter 11 or Chapter 13 proceeding if "abuse" found. Abuse is presumed if debtor has sufficient income to pay back a portion of debts. 11 [U.S.C.](#) § 707; 11 [U.S.C.](#) § 104.
 - a. Abuse is always presumed if debtor has certain level of net monthly income projected over five years, available for paying unsecured creditors.
 - b. Abuse is never presumed if net monthly income less than specified levels.
 - c. Abuse is presumed if projected monthly income after approved deductions is sufficient to pay at least 25% of debtor's general unsecured claims over five years.
 - d. Determination made of current monthly income and compared to median family income as reported by the Census Bureau with possible adjustment based on changes in Consumer Price Index from census report.
 - e. Specified levels subject to change at least every three years, most recently as of April 1, 2022.
4. BAPCPA seeks to curb the risk that debtors emerging from Chapter 7 or Chapter 13 proceeding will suffer repeated, future financial failure. 11 [U.S.C.](#) § 109(h); 11 [U.S.C.](#) § 111; 11 [U.S.C.](#) § 521(b); 11 [U.S.C.](#) § 727(a)(11).
 - a. Debtor must participate in individual credit counseling from an approved nonprofit credit counseling agency within 180 days before filing bankruptcy (or after filing if special circumstances found) and file a certificate of compliance.
 - b. Debtor must also take a credit education course before receiving a discharge (a fee may be charged).

B. Chapter 7—Liquidation [§ 15.543]

See 11 [U.S.C.](#) ch. 7.

1. Debtor files petition, statement of affairs, schedules of creditors and assets, tax returns, and check stubs.
 - a. More information to be disclosed if debtor engaged in business.
 - b. Failure to make complete disclosure may result in denial of discharge.
2. Listed creditors receive notice of filing and meeting of creditors (section 341 meeting notice). 11 [U.S.C.](#) § 341.
 - a. Trustee presides over section 341 meeting.
 - b. Creditors may examine debtor.
 - c. Creditor may conduct separate examination. Rule 2004.
3. Trustee
 - a. Reviews statement of affairs and schedules.
 - b. Determines available property of estate.
 - c. Marshals assets.
 - d. Pays creditors pro rata based on filed claims.
4. Debtor receives discharge unless creditor
 - a. Files timely objection to discharge or dischargeability of debt under 11 [U.S.C.](#) § 727, and
 - b. Obtains determination denying discharge or dischargeability.
5. Case closed after
 - a. Discharge determined, and
 - b. Trustee pays creditors from available assets.

C. Chapter 11—Reorganization [§ 15.544]

1. Similar procedure to Chapter 7 except debtor acts as debtor-in-possession (DIP) with trustee powers. 11 [U.S.C.](#) § 1107.
 - a. DIP has fiduciary responsibility.

- b. DIP must make periodic reports to court. Rule 2015.
 - c. Creditor may seek appointment of trustee for cause. 11 [U.S.C.](#) § 1104.
2. DIP has exclusive 120-day period to file reorganization plan. 11 [U.S.C.](#) § 1121.
 - a. Thereafter any party in interest may file plan, including liquidating plan.
 - b. DIP negotiates with secured creditors; must obtain agreement or court approval for use of cash collateral. 11 [U.S.C.](#) § 363.
 - c. Committee formed to protect interests of all unsecured creditors. 11 [U.S.C.](#) § 1102.
3. Court approves disclosure statement outlining plan.
4. Plan submitted to creditors for vote.
5. Creditors may object to disclosure statement and plan.
6. Plan approved over dissenting votes if plan meets statutory criteria including best-interest test and fair-and-equitable test (cramdown). 11 [U.S.C.](#) § 1129(a)(7), (b)(1); *In re Madison Hotel Assocs.*, 749 F.2d 410 (7th Cir. 1984).
7. Confirmed plan binds creditors.
8. *Fast-track procedures* exist for small business (under \$2,725,625 total debt) when chosen by debtor. 11 [U.S.C.](#) § 101(51C), (51D); 11 [U.S.C.](#) § 1116; 11 [U.S.C.](#) § 1121; 11 [U.S.C.](#) § 1125(f); *see infra* § [15.11](#).

D. Chapter 11—Subchapter V (Small Business Debtors) [§ 15.545]

1. Effective February 19, 2020, small business debtors may elect to reorganize under 11 [U.S.C.](#) § 1181.
2. Debt must be under \$2,725,625. 11 [U.S.C.](#) § 101(51D).
3. To streamline the small business reorganization, 11 [U.S.C.](#) § 1181(a) makes 11 [U.S.C.](#) § 105(d), 11 [U.S.C.](#) § 1101(1), 11 [U.S.C.](#) § 1104, 11 [U.S.C.](#) § 1105, 11 [U.S.C.](#) § 1106, 11 [U.S.C.](#) § 1107, 11 [U.S.C.](#) § 1108, 11 [U.S.C.](#) § 1115, 11 [U.S.C.](#) § 1116, 11 [U.S.C.](#) § 1121, 11 [U.S.C.](#) § 1123(a)(8), (c), 11 [U.S.C.](#) § 1127, 11 [U.S.C.](#) § 1129(a)(15), (b), (c), (e), and 11 [U.S.C.](#) § 1141(d)(5) inapplicable.
4. Only the debtor has authority to propose a plan.
5. Debtor must file plan within 90 days after the order for relief. 11 [U.S.C.](#) § 1189.
6. Unless the court orders otherwise, debtor need not file a disclosure statement. 11 [U.S.C.](#) § 1181(b).

7. Unless the court orders otherwise, Subchapter V eliminates the unsecured creditors' committee. 11 [U.S.C.](#) § 1181(b).
8. The U.S. Trustee has the authority to appoint a standing trustee. 11 [U.S.C.](#) § 1183(a).
9. The Small Business Standing Trustee must "facilitate the development of a consensual plan of reorganization." 11 [U.S.C.](#) § 1183(b)(7).
10. A debtor who owns a "single asset real estate" and who derives most of its income from the ownership or operation of the single real property does not qualify. *See* 11 [U.S.C.](#) § 101(51D); 11 [U.S.C.](#) § 362(d).
11. 11 [U.S.C.](#) § 1186 and 11 [U.S.C.](#) § 1191 do not appear to address post-petition income before the plan is confirmed.
12. Small-business debtor may modify their residential mortgage provided the new value received was "(A) not used primarily to acquire the real property; and (B) used primarily in connection with the small business of the debtor." 11 [U.S.C.](#) § 1190(3). This deviates from the antimodification provisions of Chapters 11, 12, and 13.

E. Chapter 12—Family Farmer or Family Fisherman Reorganization [§ 15.546]

1. Chapter 12 designed to give *family farmer* or *family fisherman* the opportunity for financial rehabilitation; closely modeled after Chapter 13.
2. Chapter sets the family farmer debt limitation. 11 [U.S.C.](#) § 101(18); 11 [U.S.C.](#) § 104.
 - a. Aggregate debts must not exceed \$10 million.
 - b. At least 50% of aggregate, noncontingent, liquidated debts (excluding debt for principal residence) must arise out of farming operation owned and operated by farmer.
 - c. Farmer must receive more than 50% of gross income from the farming operation for the prior taxable year or for each of the second and third taxable years preceding the taxable year in which the case is filed.
 - d. Available to family-type corporation or partnership that qualifies under debt-limitation rule.
 - e. These dollar limitations became effective April 1, 2022 (adjusted every three years).
3. To be a family fisherman, the debtor must be engaged in a commercial fishing operation. 11 [U.S.C.](#) § 101(19A); 11 [U.S.C.](#) § 104.
 - a. Aggregate debts must not exceed \$2,044,225.
 - b. At least 80% of aggregate, noncontingent liquidated debts (excluding debts for principal residence) must arise from commercial fishing operation.

- c. Fisherman must receive more than 50% of gross income from the commercial fishing operation.
 - d. Available to family-type corporation or partnership that meets debt and other limitations.
 - e. These dollar limitations became effective April 1, 2022 (adjusted every three years).
- 4. Debtor acts as DIP with trustee powers. 11 [U.S.C.](#) § 1203.
 - 5. Creditors may seek removal of debtor as DIP. 11 [U.S.C.](#) § 1204.
 - 6. DIP has 90 days from filing petition to file plan, unless extended by court. 11 [U.S.C.](#) § 1221.
 - a. Confirmation hearing must be concluded not later than 45 days after filing plan, unless extended for cause. 11 [U.S.C.](#) § 1224.
 - b. Case may be dismissed by court upon failure to timely file plan; cannot be refiled under Chapter 12. 11 [U.S.C.](#) § 1208(c)(3).
 - 7. Plan may be modified before *or* after confirmation. 11 [U.S.C.](#) § 1223; 11 [U.S.C.](#) § 1229; *see, e.g., In re Crowley*, 85 B.R. 76 (Bankr. W.D. Wis. 1988); *see also In re Luchenbill*, 112 B.R. 204 (Bankr. E.D. Mich. 1990).
 - 8. Plan approved over objection if meets statutory criteria, including cramdown-type tests. 11 [U.S.C.](#) § 1222; 11 [U.S.C.](#) § 1225.
 - 9. Existing Chapter 11 cases may be converted to Chapter 12 if conversion is equitable. 11 [U.S.C.](#) § 1112(d)(3).

F. Chapter 13—Adjustment of Debts by Individual [§ 15.547]

- 1. Alternative to liquidation available to individuals with regular income.
 - a. Payment through extension—creditors extend time for repayment of 100% of their claims, *or*
 - b. Payment through composition—creditors agree to accept less than 100% of claims to discharge debt.
- 2. Consider whether debts could be determined nondischargeable in Chapter 7.
- 3. Debt limitation
 - a. Noncontingent, liquidated, unsecured debts less than \$419,275. 11 [U.S.C.](#) § 104; 11 [U.S.C.](#) § 109(e).
 - b. Noncontingent, liquidated, secured debts less than \$1,257,850.
 - c. These dollar limitations became effective April 1, 2022 (adjusted every three years).

4. Court on its own motion may dismiss a Chapter 7 case involving consumer debts if granting relief would abuse provision of Bankruptcy Code, thus compelling consideration of Chapter 13. 11 [U.S.C.](#) § 707.
5. Plan is confirmed if it meets statutory requirements, including good faith. 11 [U.S.C.](#) § 1325; *In re Smith*, 848 F.2d 813 (7th Cir. 1988); *Ravenot v. Ringale (In re Ringale)*, 669 F.2d 426 (7th Cir. 1982).
 - a. Under the CARES Act, as amended by the COVID-19 Bankruptcy Relief Extension Act of 2021, the term of a Chapter 13 plan confirmed before March 27, 2021 can be extended beyond five years. CARES Act, Pub. L. No. 116-136, § 1113, 134 Stat. 281, 312; COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, § 2(b)(1), 135 Stat. 249; *see also* 11 [U.S.C.](#) § 1329(d). This provision sunset on March 27, 2022.
 - (1) The CARES Act does not permit modification of a plan that was not confirmed before the Act's effective date. *See, e.g., In re Roebuck*, 618 B.R. 730 (Bankr. W.D. Pa. 2020).
6. Plan may be confirmed over secured creditor's objection if cramdown interest rate is based on "formula" consisting of national prime rate adjusted for nonpayment risk. *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).
7. Trustee supervises payments to creditors under court-approved Chapter 13 plan.
8. Debtor receives discharge after substantially complying with plan. 11 [U.S.C.](#) § 1328.

IV. BANKRUPTCY ESTATE [§ 15.548]

A. Property of the Estate [§ 15.549]

1. All legal or equitable interests of debtor in property when case begins. 11 [U.S.C.](#) § 541(a)(1).
2. Interests of debtor and spouse in community and marital property subject to some limitations. 11 [U.S.C.](#) § 541(a)(2).
 - a. Presumption that all property of spouses is marital property. [Wis. Stat.](#) § 766.31(1), (2).
 - b. May include certain marital business property of nondebtor spouse. 11 [U.S.C.](#) § 541(a)(2).
3. Property turned over to trustee or recovered under avoiding powers. 11 [U.S.C.](#) § 329(b); 11 [U.S.C.](#) § 363(n); 11 [U.S.C.](#) § 542; 11 [U.S.C.](#) § 543; 11 [U.S.C.](#) § 550; 11 [U.S.C.](#) § 553; 11 [U.S.C.](#) § 723.
4. Property debtor acquires by bequest, devise, inheritance, property settlement with spouse, or benefits of life insurance policies within 180 days after petition filed. 11 [U.S.C.](#) § 329(b); 11 [U.S.C.](#) § 363(n); 11 [U.S.C.](#) § 543; 11 [U.S.C.](#) § 550; 11 [U.S.C.](#) § 553; 11 [U.S.C.](#) § 723.
5. Proceeds, products, offspring, and rents of or from property of estate after case begins but not including earnings from services performed by debtor.

6. Expanded definition of *property* in Chapter 12 and 13 cases includes property acquired after commencement of case; includes earnings. 11 [U.S.C.](#) § 1207; 11 [U.S.C.](#) § 1306.

B. Role of Trustee [§ 15.550]

1. Trustee is ideal lien creditor with strong-arm power that may be used to marshal assets for creditors' benefit. 11 [U.S.C.](#) § 544.
 - a. May obtain turnover of property to estate. 11 [U.S.C.](#) § 542.
 - b. May avoid liens and fraudulent transfers. 11 [U.S.C.](#) § 544; 11 [U.S.C.](#) § 545.
 - c. May recover preferences. 11 [U.S.C.](#) § 547.
2. Trustee may use, sell, or lease property. 11 [U.S.C.](#) § 363.
3. Abandonment of estate property. 11 [U.S.C.](#) § 554; Rule 6007.
 - a. Trustee may abandon any property of estate that is burdensome or of inconsequential value to estate (no equity for unsecured creditors, etc.).
 - b. Secured creditor may compel trustee to decide by filing motion for abandonment.
 - c. Abandonment and relief from stay are separate and distinct.
 - d. Motion by a party in interest must follow procedure in Rule 6007(b).
4. Executory contracts and unexpired leases of debtor. 11 [U.S.C.](#) § 365; Rules 6006, 9014.
 - a. Trustee may assume or reject within specified time periods.
 - b. If debtor in default, trustee must promptly cure.
 - c. Bankruptcy clauses (*ipso facto*) unenforceable by creditor.

V. DEBTOR'S RIGHTS [§ 15.551]

A. Exemptions—Fresh Start [§ 15.552]

1. Debtors may exempt items of property from creditors' claims under state or federal statutes; compare results to obtain optimal exemptions. 11 [U.S.C.](#) § 522(b); [Wis. Stat.](#) §§ 815.18, 815.20, 425.106; *Schwab v. Reilly*, 560 U.S. 770 (2010). Examples include the following:
 - a. State homestead exemption (\$75,000 per individual; \$150,000 per household) is larger than federal exemption (\$25,150). 11 [U.S.C.](#) § 522(d).
 - b. State exempts (per spouse) \$12,000 of consumer goods and \$15,000 of farm property; Bankruptcy Code exempts (per spouse) \$13,400 of consumer goods and \$2,525 of business and farm property and allows use of unused homestead exemption.

- c. Federal exemption amounts became effective April 1, 2022.
 - d. Note differences in exemption of retirement benefits; no “reasonably necessary for support” requirement under state exemptions unless “owner-dominated plan.” 11 [U.S.C.](#) § 522(d)(10); [Wis. Stat.](#) § 815.18(3)(j).
2. Secured creditors unaffected by exemptions, except
 - a. Debtor may avoid fixing of certain liens to extent such liens impair exemption. 11 [U.S.C.](#) § 522(f).
 - b. Debtor may exempt certain avoidable transfers. 11 [U.S.C.](#) § 522(b), (h).
 3. Debtor files list of exempt property with schedules. Rule 4003.
 - a. Debtor may amend under certain conditions.
 - b. Creditors must promptly object to exemptions; deadlines specified in section 341 meeting notice. 11 [U.S.C.](#) § 341; Rule 4003(b).
 - c. Value in excess of statutory exemption amount may be available for creditors.
 4. Debtor may engage in prebankruptcy exemption planning, within limits. *Smiley v. First Nat’l Bank of Belleville (In re Smiley)*, 864 F.2d 562 (7th Cir. 1989); *In re Woller*, 483 B.R. 886, 902 (Bankr. W.D. Wis. 2012).

B. How Debtor Keeps Property [§ 15.553]

1. Debtor may retain property subject to security interest if debtor reaffirms debt or redeems property. *In re Edwards*, 901 F.2d 1383 (7th Cir. 1990).
2. Debtor may reaffirm debt. 11 [U.S.C.](#) § 524(c).
 - a. Must be voluntary written agreement approved by court before discharge granted.
 - b. Creditor must make disclosures to the debtor regarding the debt being reaffirmed before execution of the agreement. 11 [U.S.C.](#) § 524(k).
 - c. Debtor has 60-day right of rescission.
 - d. Reaffirmation usually for value of collateral rather than amount of debt (unless debt less than value).
 - e. Debtor may voluntarily repay even if reaffirmation not approved by court. 11 [U.S.C.](#) § 524(f).
 - f. Creditor not required to accept reaffirmation.

3. Debtor may redeem interest in collateral exempted or abandoned by paying value. 11 [U.S.C.](#) § 722.
4. Debtor must file statement of intention as to property securing debt. 11 [U.S.C.](#) § 521(a)(2)(A), (B).
 - a. Statement must indicate whether debtor will redeem, reaffirm, or surrender property securing debt.
 - b. File intention within 30 days after case filed and carry out intention within 30 days after first date for meeting of creditors (unless extended by court).
 - c. If personal property secured by purchase money security interest, the Chapter 7 individual debtor must redeem, reaffirm, or surrender the property within 45 days after the first meeting of creditors, failing which, the property is deemed abandoned by the estate and the automatic stay is terminated. 11 [U.S.C.](#) § 521(a)(6).

VI. AUTOMATIC STAY [§ 15.554]

A. Effect of Stay [§ 15.555]

1. 11 [U.S.C.](#) § 362 provides for an immediate prohibition barring creditors from
 - a. Commencing or continuing judicial or other proceedings against debtor with respect to claims that arose *before* commencement of bankruptcy case;
 - b. Enforcing *prefiling* judgment against debtor or property of estate;
 - c. Taking action to obtain possession of property of estate or property from estate;
 - d. Asserting set-off; and
 - e. Taking action to create, perfect, or enforce lien except as provided.
2. Stay is effective against creditors even without notice.
3. Stay is against pursuing co-debtors on consumer debts in Chapters 12 and 13. 11 [U.S.C.](#) § 1201; 11 [U.S.C.](#) § 1301.
4. Violation of stay may subject creditor to contempt proceedings.
5. Stay protects “property of the debtor,” including all post-petition marital property. *In re Passmore*, 156 B.R. 595 (Bankr. E.D. Wis. 1993).

B. Duration of Stay [§ 15.556]

See 11 [U.S.C.](#) § 362(c).

1. Stay terminates against property when that property is no longer property of estate, e.g., sold or abandoned;

2. Stay terminates with respect to other acts when case closed or dismissed, or when discharge granted or denied (whichever comes first); or
3. Stay terminates in *single asset real estate* cases upon the later of (i) 30 days after the court determines debtor is *single asset real estate debtor*, or (ii) 90 days after the order for relief, unless reasonable plan filed or debtor begins payments. 11 [U.S.C.](#) § 362(d). *See generally* 11 [U.S.C.](#) § 101(51B).
4. Stay cannot go into effect if a single or a joint case is filed by or against a debtor who is an individual under this title, and if two or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than Chapter 7 after dismissal under 11 [U.S.C.](#) § 707(b). Court will enter order confirming that no stay is in effect upon request of a party in interest. *See* 11 [U.S.C.](#) § 362(c)(4).

C. Relief from Stay/Adequate Protection [§ 15.557]

1. Creditor may obtain relief terminating, modifying, or conditioning stay. 11 [U.S.C.](#) § 362.
2. Court will grant relief
 - a. Under 11 [U.S.C.](#) § 362(d)(1), for cause, including lack of adequate protection of creditor's interest in collateral; or
 - b. If debtor has no equity in collateral and the collateral is not necessary to effective reorganization. 11 [U.S.C.](#) § 362(d)(2); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).
3. Relief may be granted after notice and hearing. Rules 4001(a), 9014.
 - a. Creditor files motion; gives notice of filing to interested persons.
 - b. Notice specifies that unless hearing requested, relief granted (at least 14 days' notice recommended; consult local rules for form of notice). Form B420A.
 - c. If no hearing is requested, obtain order for relief from court.
 - d. If hearing requested, creditor has burden of proving whether debtor has any equity; debtor has burden of providing adequate protection.
4. Adequate protection may include payment, replacement lien, or indubitable equivalent. 11 [U.S.C.](#) § 361.
5. Definitions of adequate protection in 11 [U.S.C.](#) § 361 are inapplicable in Chapter 12. 11 [U.S.C.](#) § 1205.
 - a. Instead, may provide cash payment or additional or replacement liens to protect against depreciation, pay "reasonable rent customary in the community where property located," or provide other relief to protect value of property.

- b. Creditors may not receive interest or lost opportunity costs.
6. A bankruptcy court's final adjudication on denial of a motion for relief from stay constitutes an appealable order. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020).

VII. CLAIMS [§ 15.558]

See 11 [U.S.C.](#) § 501; 11 [U.S.C.](#) § 502.

A. Proof of Claim [§ 15.559]

See Forms B410–B410S-2.

1. Must file and be “allowed” in order to receive distribution from estate (Chapter 7) or payment under plan (Chapters 12 and 13).
 - a. Claim allowed unless party in interest objects.
 - b. Claim should be properly documented.
2. *Claim* includes claim against debtor *or* debtor's property; creditors of nondebtor spouse should file claim because of Marital Property Act. 11 [U.S.C.](#) § 101(5); 11 [U.S.C.](#) § 102(2); [Wis. Stat.](#) § 766.55(2).
3. If it is a *no-asset* Chapter 7 case, no need to file claim. If trustee later discovers assets, a notice to file claim will be sent to creditors.
4. In Chapter 11, claim need not be filed unless not listed in schedules or listed as disputed, contingent, or unliquidated. 11 [U.S.C.](#) § 1111(a).
 - a. Creditors have responsibility for checking schedules, filing claim if they disagree with amount listed in schedules.
 - b. Prudent to file claim in any event.
5. Deadlines for filing claim and notification of a no-asset case are set forth in section 341 meeting notice. 11 [U.S.C.](#) § 341.
 - a. Chapter 7: In a voluntary Chapter 7 case, 70 days after the order for relief under the chapter or the date of the order of conversion to a case under Chapter 12 or Chapter 13. In an involuntary Chapter 7 case, a proof of claim is timely filed if it is filed no later than 90 days after the order for relief under that chapter is entered. Rule 3002(c).
 - b. Chapter 11: Fixed by court (see section 341 meeting notice and local rules). Rule 3003(c).
 - c. Chapter 12: Same as Chapter 7 (consult section 341 meeting notice). FFBA § 305(b); Rule 3002(c).
 - d. Chapter 13: Same as Chapter 7. Rule 3002(c).

6. Late-filed claims permitted in Chapter 11 if excusable neglect is present. Rule 9006(b)(1); *see also Pioneer Inv. Servs., Inc. v. Brunswick Assocs.*, 507 U.S. 380 (1993); *In re Byrne*, 162 B.R. 816 (Bankr. W.D. Wis. 1993).

B. Priority, Secured, and Unsecured Claims [§ 15.560]

1. Priority claims include administration expenses, taxes, and wages. 11 [U.S.C.](#) § 507.
2. Secured claim equals value of collateral; thus, may have partially secured and unsecured claim.
3. Unsecured claim may include contingent, disputed, or unliquidated claim.

C. Objections to Claim [§ 15.561]

See Rule 3007.

1. After notice and hearing, court determines amount of claim. 11 [U.S.C.](#) § 502(b).
2. Notice and hearing procedure is similar to relief from stay/adequate protection, *see supra* § [15.23](#).
3. Allowed claims may be reconsidered until case closed. 11 [U.S.C.](#) § 502(j).

VIII. DISCHARGE AND DISCHARGEABILITY OF DEBT [§ 15.562]

A. Discharge—Relief from Debts [§ 15.563]

See 11 [U.S.C.](#) § 727.

1. Individual debtor granted discharge from debts unless denied.
 - a. Trustee or creditor may object to discharge. Determination made in adversary proceedings (complaint filed), unless based on previously received discharge, which is determined by motion practice. 11 [U.S.C.](#) § 727(a)(8), (9); 11 [U.S.C.](#) § 1328(f); Rules 4004, 7001(4).
 - b. Grounds for denial include acts by debtor that generally affect all creditors adversely (e.g., failure to keep records, fraud on creditors, false oath). 11 [U.S.C.](#) § 727(a)(2)–(12).
 - c. Adverse procedure as in civil litigation.
2. Creditor of nondebtor spouse compelled to object to discharge in debtor's bankruptcy because of Marital Property Act.

B. Objection to Dischargeability of Debt [§ 15.564]

See 11 [U.S.C.](#) § 523.

1. Individual creditor may file objection to discharge of specific debt.

2. Determination made in adversary proceeding. Rule 7001(6).
3. Grounds for denial include wrongful acts by debtor against creditor or collateral securing debt (e.g., false financial statement, conversion of collateral, fraudulent transfer scheme). 11 [U.S.C.](#) § 523(a)(2), (4), (6); *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356 (2016); *CQM, Inc. v. VandenBush (In re VandenBush)*, 614 B.R. 306 (Bankr. E.D. Wis. 2020).
4. Creditor of nondebtor spouse also compelled to object to dischargeability of debt because of Marital Property Act.

C. Deadlines for Filing Objections [§ 15.565]

1. Must file objections within statutory deadlines (unless properly extended).
 - a. Chapter 7: 60 days after first date set for section 341 meeting. Rules 4004(a), 4007(c).
 - b. Chapter 11. Rules 4004(a), 4007(c).
 - (1) Discharge: First date set for confirmation hearing.
 - (2) Dischargeability: Same as Chapter 7.
 - c. Chapter 12: Same as Chapter 7 (consult section 341 meeting notice). Rule 4007.
 - d. Chapter 13. 11 [U.S.C.](#) § 1328; Rule 4007(d).
 - (1) Discharge: Depends on compliance with plan.
 - (2) Dischargeability: Court will notice.
2. See section 341 meeting notice. 11 [U.S.C.](#) § 341.

D. Dischargeability Issues in Chapter 13 [§ 15.566]

1. May discharge otherwise nondischargeable debts. 11 [U.S.C.](#) § 1328.
 - a. Exceptions include domestic support obligations (formerly known as “support” and “alimony”). 11 [U.S.C.](#) § 1328(a); 11 [U.S.C.](#) § 523(a)(5).
 - b. Consider filing Chapter 13 if potential objection to dischargeability in Chapter 7.
2. No discharge of certain 11 [U.S.C.](#) § 523(a)-type debts if hardship discharge. 11 [U.S.C.](#) § 1328; 11 [U.S.C.](#) § 523(a).

IX. BANKRUPTCY PLANNING AND STRATEGY [§ 15.567]

A. Debtor's Viewpoint [§ 15.568]

1. Complete disclosure and documentation necessary to avoid objections to discharge.

2. Prebankruptcy planning essential to maximize exemptions.
3. Consider impact of Marital Property Act.
4. Determine status of liens and whether avoidable.
5. Carefully note deadlines for requesting hearings, etc.

B. Creditor's Viewpoint [§ 15.569]

1. Secured creditors should take prompt action to protect collateral position by filing appropriate motions, including
 - a. Obtaining relief from stay/adequate protection.
 - b. Prohibiting use of cash collateral.
 - c. Secured *and* unsecured creditors should determine necessity of filing proof of claim.
2. Consider whether to take active role in Chapter 11.
3. Consider impact of Marital Property Act, especially in cases involving a nondebtor spouse. [Wis. Stat.](#) ch. 766.
4. Consider objecting to other claims.
5. Review discharge and dischargeability issues.
6. Unsecured sellers should promptly consider reclamation rights and priority claims for goods received by debtor within 20 days before petition date. 11 [U.S.C.](#) § 503(b)(9); 11 [U.S.C.](#) § 546(c).
7. Carefully note all deadlines for filing claims, objections, requesting hearings, etc.

Chapter 16

Creditor-Debtor Relations

Eliza M. Reyes
Steinhilber Swanson LLP
Madison

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Mar. 2022, No. 795; all references to the United

States Code (U.S.C.) are current through Pub. L. No. 117-113 (Apr. 19, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 22,428 (Apr. 21, 2022).

I. INTRODUCTION [§ 16.570]

A. In General [§ 16.571]

This outline reviews several major aspects of creditor-debtor relations under Wisconsin law, including

1. The Wisconsin Consumer Act. [Wis. Stat.](#) chs. 421–427.
2. The effect of the Wisconsin Marital Property Act, [Wis. Stat.](#) ch. 766, on creditor-debtor rights.
3. Nonconsumer remedies under Wisconsin law, including execution, attachment, and garnishment.

NOTE: This chapter is not meant as an extensive review of federal law on the subject.

B. Additional Sources [§ 16.572]

For more comprehensive treatment of specific areas of creditor-debtor relations, consult the following sources:

1. For creditor-debtor relations under the Wisconsin Marital Property Act, see Christine Rew Barden et al., [Marital Property Law & Practice in Wisconsin](#) (State Bar of Wis. 3d ed. 2021).
2. For federal truth-in-lending matters, see Ralph C. Clontz, *Truth-in-Lending Manual* (7th ed. 1996).
3. For nonconsumer creditor remedies, see Robert A. Pasch, *Wisconsin Collection Law* (2d ed. 2006 & Supp. 2020).
4. For consumer and commercial transactions, see Ralph C. Anzivino et al., [Commercial and Consumer Transactions in Wisconsin](#) (State Bar of Wis. 2d ed. 2016 & Supp.).

II. WISCONSIN CONSUMER ACT [§ 16.573]

A. Overview [§ 16.574]

1. Effective March 1, 1973.
2. Wisconsin Consumer Act (Act) provisions apply to consumer transactions involving merchant and customer.
3. See section [16.7](#), *infra*, regarding scope of Act.
4. See [Wis. Admin. Code](#) ch. DFI-WCA 1 for regulations related to the Act.

B. Definitions [§ 16.575]

1. *Consumer transaction* is a transaction in which one party is a customer for purposes of the transaction. [Wis. Stat.](#) § 421.301(13).
2. *Customer* is a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes or, for purposes of [Wis. Stat.](#) ch. 427 only, agricultural purposes. [Wis. Stat.](#) § 421.301(17).
3. *Consumer credit transaction* includes consumer credit sales, consumer loans, consumer leases, and transactions under open-end credit plans (defined at paragraph 7, *infra*). [Wis. Stat.](#) § 421.301(10).

- a. Consumer transaction is between merchant and customer.
- b. Real or personal property, services, or money is acquired on credit.
- c. Customer's obligation is payable in installments or finance charge may be imposed. *Rent-A-Center, Inc. v. Hall*, 181 Wis. 2d 243 (Ct. App. 1993).

NOTE: A consumer lease may include a rent-to-own lease. *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, 123 Wis. 2d 79 (Ct. App. 1985).

- d. Motor vehicle consumer lease in which total lease obligation is \$25,000 or less is governed by [Wis. Stat.](#) ch. 429, *see infra* § [16.26](#). 1995 Wis. Act 329.
4. *Creditor* is a merchant who regularly engages in consumer credit transactions or in arranging for extensions of consumer credit by procuring consumer credit from third persons. [Wis. Stat.](#) § 421.301(16).

NOTE: A purchaser of consumer debt is not a "creditor" under the Act. *Rsidue, LLC v. Michaud*, 2006 WI App 164, 295 Wis. 2d 585.

5. *Collateral*, for purposes of creditors' remedies, is defined as goods subject to security interest securing customer's obligation under consumer credit transaction. [Wis. Stat.](#) § 425.202.
6. *Merchant* is person who regularly advertises, distributes, offers, supplies, or deals in real or personal property, services, money, or credit that results in, leads to, or induces consumer transaction. [Wis. Stat.](#) § 421.301(25).
7. *Open-end credit plan*, *see* [Wis. Stat.](#) § 421.301(27), is a plan to extend consumer credit that

- a. Permits loans or purchases from time to time,
- b. May be paid in full or in installments,
- c. Has finance charge added on outstanding unpaid balance, and
- d. Is treated by creditor as open-end credit for disclosure.

C. Scope and Jurisdiction [§ 16.576]

1. Per [Wis. Stat.](#) § 421.201(1), the Act generally applies to
 - a. Consumer transactions made in Wisconsin; and
 - b. Modifications (including refinancing(s)) made in Wisconsin of consumer credit transactions, wherever made.
2. Consumer transaction is made in this state if
 - a. Writing evidencing obligation is signed by customer or offer from customer is received by merchant in this state, [Wis. Stat.](#) § 421.201(2)(a); or
 - b. Merchant induces customer who is a resident of Wisconsin to enter into transaction by face-to-face, mail, or telephone solicitation directed to particular customer in Wisconsin, [Wis. Stat.](#) § 421.201(2)(b).
3. Per [Wis. Stat.](#) § 421.201(3), for open-end credit transactions, Act applies if
 - a. Customer is Wisconsin resident; and
 - b. Creditor or merchant honoring credit card
 - (1) Is Wisconsin resident;
 - (2) Furnishes, mails, or delivers goods, services, or credit to Wisconsin resident in Wisconsin; or
 - (3) Receives writing signed by customer and evidencing transaction in Wisconsin.
4. Act applies to any Wisconsin debt collection activity directed to customers in Wisconsin. [Wis. Stat.](#) § 421.201(4).
5. Act applies to “actions or proceedings brought in this state to enforce rights arising from consumer transactions ... wherever made”; however, conduct to recover collateral is governed by laws of state where collateral located at time of recovery. [Wis. Stat.](#) § 421.201(5); *see Credit Acceptance Corp. v. Kong*, 2012 WI App 98, ¶ 11, 344 Wis. 2d 259.
6. Per [Wis. Stat.](#) § 421.202, Act does *not* apply to
 - a. Extensions of credit to organizations;
 - b. Transactions in which all parties are organizations;
 - c. Certain transactions related to public utility or common carrier tariffs;
 - d. Rate ceilings for pawnbrokers;

- e. Insurance sales by insurers;
 - f. Consumer credit transactions in which amount financed exceeds \$25,000, or other consumer transactions in which cash price exceeds \$25,000;
 - (1) The amount-financed dollar exclusion applies to consumer equipment leases. *American Indus. Leasing Co. v. Geiger*, 118 Wis. 2d 140 (Ct. App. 1984).
 - (2) When the cash price of leased building exceeded \$25,000, Act did not apply. *American Indus. Leasing Co. v. Moderow*, 147 Wis. 2d 64 (Ct. App. 1988).
 - g. [Wis. Stat.](#) ch. 428 transactions (first lien real estate and other mortgage loans);
 - h. Securities transactions involving broker-dealer;
 - i. Motor vehicle consumer leases in which total lease obligation exceeds \$25,000; or
 - j. Transactions that are primarily for agricultural purpose, except for agricultural purpose transactions from [Wis. Stat.](#) ch. 427 or credit transactions for agricultural purpose from [Wis. Stat.](#) § 422.210.
7. Lender may opt into Act; must meet requirements and make disclosures required by Act. *Bank of Barron v. Gieseke*, 169 Wis. 2d 437 (Ct. App. 1992).

D. Venue [§ 16.577]

See [Wis. Stat.](#) § 421.401.

- 1. Proper venue for claim arising out of consumer transaction or a consumer credit transaction is the county
 - a. Where customer resides or is personally served;
 - b. Where collateral securing consumer credit transaction is located;
 - c. Where customer sought or acquired property, services, money, or credit that is subject of transaction; or
 - d. Where customer signed document evidencing customer's obligation under terms of transaction.
- 2. If venue is found to be improper, court must, on motion of party or its own motion, transfer action to another county, unless defendant appears and waives improper venue.

III. CONSUMER CREDIT TRANSACTIONS [§ 16.578]

A. Maximum Charges [§ 16.579]

- 1. For consumer credit transactions other than those pursuant to open-end credit plans

- a. For transactions entered into before April 6, 1980, 18% per year on part of unpaid balance of amount financed that is \$500 or less, and 12% per year on part that exceeds \$500. [Wis. Stat. § 422.201\(2\)\(b\)](#).
 - b. For transactions entered into on or after April 6, 1980, and before November 1, 1981 (other than by savings and loan association), 18% per year on part of unpaid balance of amount financed that is \$1,000 or less, and 15% per year on part that exceeds \$1,000. [Wis. Stat. § 422.201\(2\)\(a\)](#).
 - c. For transactions entered into on or after November 1, 1981, and before November 1, 1984, maximum rate is the greater of 18% per year or rate 6% in excess of interest rate applicable to six-month U.S. treasury bills. [Wis. Stat. § 422.201\(2\)\(bm\)](#).
 - d. For transactions entered into after October 31, 1984, there is no maximum limit on finance charges. [Wis. Stat. § 422.201\(2\)\(bn\)](#).
2. Regardless of date open-end credit plan is entered into, parties may agree to finance charge at any periodic rate. [Wis. Stat. § 422.201\(10s\)](#).

NOTE: For plans in existence before the effective date of 1995 Wis. Act 328 (May 17, 1996), the finance charge may be changed to any periodic rate, so long as the open-end credit plan permits the change in rate and the applicable change-in-terms requirements of [Wis. Stat. § 422.415 \(1993–94\)](#) or the variable-rate transaction requirements of [Wis. Stat. § 422.421 \(1993–94\)](#) are followed.

3. For sellers of farm equipment, farm implements, and farm tractors (other than licensees under [Wis. Stat. ch. 218](#)), maximum rate is
 - a. For transactions entered into before April 6, 1980, 16.25% for transactions with a term less than 72 months and 14.7% for those exceeding 72 months; or
 - b. 18% for transactions entered into on or after April 6, 1980, and before November 1, 1981. [Wis. Stat. § 218.01\(6\)\(b\) \(1993–94\)](#).

At present, there is no limit on maximum rate permitted for sales of farm equipment, farm implements, and farm tractors under Act.
4. For lenders licensed under [Wis. Stat. § 138.09](#), there is no interest rate limit on loans made after October 31, 1984, whether precomputed or based on the actuarial method. [Wis. Stat. § 138.09\(7\)\(bp\)](#).

B. Additional Charges [§ 16.580]

See [Wis. Stat. § 422.202](#).

1. In addition to finance charge, Act permits certain additional charges in connection with consumer credit transactions.
2. Per [Wis. Stat. § 422.202\(1\)](#), for all consumer credit transactions, the following additional charges are permitted:

- a. Official fees and taxes; and
- b. Charges or premiums for property or liability insurance in which creditor takes security interest, if
 - (1) Clear and specific statement stating cost and term if obtained through merchant and stating that customer may select insurer.
 - (2) Creditor mails or delivers to customer a notice of right to cancel insurance. [Wis. Stat. § 424.304](#).
3. For consumer credit transactions other than those pursuant to open-end credit plans, merchant may charge for each check presented for payment returned unsatisfied because of no account with drawee, insufficient funds in account, or insufficient credit with drawee. [Wis. Stat. § 422.202\(1\)\(d\)](#). For transactions entered into on or after May 17, 1988, charge must not exceed \$15.
4. Per [Wis. Stat. § 422.202\(2\)](#), for transactions secured by first or equivalent lien on manufactured home or extension of credit secured by real property, parties may agree to additional charges, such as
 - a. Fees or premiums for title examination or similar purposes,
 - b. Fees for preparation of deeds or other documents,
 - c. Fees for notarizing deeds and other documents,
 - d. Appraisal fees, and
 - e. Survey costs.
5. Under [Wis. Stat. § 422.202\(2m\)](#), for open-end credit plans, creditor may, regardless of when a plan was entered into, bargain for and receive other fees and charges in addition to finance charge, as agreed to by parties; charges will be treated as interest.
6. Per [Wis. Stat. § 422.202\(2s\)](#), under certain conditions, creditor may contract for charges for following coverages, if not required as condition of credit, including
 - a. Consumer credit life, accident and sickness, and unemployment;
 - b. Future service or motor club service contracts; and
 - c. Breakdown, extended warranty, or maintenance service contracts.
7. Other charges permitted as approved by administrator of Act.
8. Additional charge not authorized by Act is considered part of finance charge. [Wis. Stat. § 422.202\(3\)](#).

C. Delinquency Charges [§ 16.581]

1. For transactions other than open-end credit plans, parties may agree to delinquency charge on any installment not paid in full on or before 10th day after scheduled or deferred due date in amount not to exceed \$10 or 5% of the unpaid amount of installment, whichever is less. [Wis. Stat. § 422.203\(1\)](#).
2. Payments applied first to current installments, then to delinquent installments; delinquency charge may be collected only once on an installment. [Wis. Stat. § 422.203\(2\), \(3\)](#).
3. Interest after final maturity date must not exceed greater of either 12% per year or annual rate of finance charge on transaction if transaction entered into on or after April 6, 1980, and before November 1, 1981, and must not exceed maximum rate permitted by [Wis. Stat. § 138.05\(1\)\(a\)](#), if transaction entered into before April 6, 1980. Interest after final maturity date must not exceed greater of either 12% per year or annual rate of finance charge on transaction if transaction entered into on or after November 1, 1981. [Wis. Stat. § 422.203\(4\)\(a\), \(c\)](#).

D. Preservation of Collateral [§ 16.582]

If customer fails to preserve or insure collateral, creditor may, if agreement authorizes, pay for performance of such duties; amounts paid may be added to unpaid balance of obligation if creditor has paid amounts in good faith and in commercially reasonable manner and gives customer written notice of nonperformance and opportunity to perform. [Wis. Stat. § 422.207](#).

E. Prepayment Rights [§ 16.583]

1. Customer may prepay in full or in part, at any time, without penalty the unpaid balance of any consumer credit transaction other than a transaction secured by a first lien mortgage or equivalent security interest on real estate with an original term of 10 years or more and on which the annual percentage rate disclosed pursuant to [Wis. Stat. ch. 422, subch. III](#), is 10% or less. [Wis. Stat. § 422.208](#).
2. Upon prepayment in full, amount not less than the unearned portion of finance charge must be calculated and refunded to customer. [Wis. Stat. § 422.209\(1\)](#).
3. Method of calculating refund of unearned finance charge depends on date, amount financed, and term of transaction. [Wis. Stat. § 422.209\(2\)](#).

F. Disclosure Requirements [§ 16.584]

1. In addition to disclosures required by Federal Consumer Credit Protection Act, Act includes certain disclosure requirements.
2. Per [Wis. Stat. § 422.302](#), all disclosures
 - a. Must be clear and conspicuous,
 - b. Must be in writing, and
 - c. May be supplemented by additional information or explanations that do not mislead.

3. Disclosures must be made before transaction is consummated and may be made on face of instrument evidencing transaction. [Wis. Stat.](#) § 422.302(2); *Severson Agri-Serv., Inc. v. Lander*, 172 Wis. 2d 269 (Ct. App. 1992).
4. Before any payment is due, creditor must furnish customer with exact copy of each agreement signed by customer evidencing the obligation; if more than one customer, delivery of documents to one complies. [Wis. Stat.](#) § 422.302(3).
5. For other than open-end credit transactions, [Wis. Stat.](#) § 422.303 requires the following:
 - a. In consumer credit sale, customer's obligation to pay total of payments must be evidenced by single instrument that must include, in addition to other required disclosures, the following:
 - (1) Seller's signature,
 - (2) Customer's signature,
 - (3) Date agreement signed, and
 - (4) Description of any trade-in.
 - b. Per [Wis. Stat.](#) § 422.303(3), every instrument evidencing consumer credit transaction must contain notification to customer, immediately above or adjacent to signature of customer, providing that customer
 - (1) Need not sign document before reading reverse side, even if otherwise advised;
 - (2) Should not sign document if it contains blank spaces;
 - (3) Is entitled to exact copy of any agreement signed; and
 - (4) Has right at any time to pay in advance the unpaid balance due under agreement and may be entitled to partial refund of finance charge.
6. All essential provisions of agreements evidencing transactions must be completed before signing; creditor must not permit customer to sign writing containing blank spaces to be filled in after it is signed except for identifying information for goods if not available at time of transaction. [Wis. Stat.](#) § 422.304.
7. Per [Wis. Stat.](#) § 422.305, for natural person to become obligated to assume personal liability on obligation, person must sign writing evidencing transaction or sign separate guaranty or similar instrument, and either
 - a. Receive copy of each agreement signed by customer evidencing obligation, or
 - b. Sign and receive at time of signing separate instrument explaining person's obligation.

[Wis. Stat.](#) § 422.305 is limited to situations in which person acts as a guarantor and does not extend to persons who are customers. *Grand River Coop. v. Terbeest*, 145 Wis. 2d 173 (Ct. App. 1988).

8. Per [Wis. Stat.](#) § 422.308, for open-end credit plans, every application must disclose (or, if no application is taken, separate notice must be given of)
 - a. Annual percentage rate and terms of any variable rate provision,
 - b. Date or occasion upon which finance charge begins to accrue,
 - c. Amount of any annual fee, and
 - d. Amount and nature of other charges or fees.

G. Limitations on Agreements and Practices [§ 16.585]

1. With limited exceptions, Act prohibits use of schedule of payments in which one payment is not equal or substantially equal to all other payments (balloon payments), or under which the intervals between any consecutive payments differ substantially for certain closed-end consumer credit sales and consumer loans. [Wis. Stat.](#) § 422.402(1), (1m).
2. Maximum period of repayment limited for closed-end credit transactions with total of payments of less than \$2,000. [Wis. Stat.](#) § 422.403.
3. Assignments of earnings for payment or as security for payment of obligation must be revocable at will by customer. [Wis. Stat.](#) §§ 241.09, 422.404.
 - a. No salary or wage assignment of any married person is valid unless assignment is in writing and signed by person's spouse, if spouse is family member at the time; spouse's signature must be witnessed by two disinterested witnesses.
 - b. Assignment of salary or wages is valid for six months from date of making; restrictions on assignments do not apply to authorizations from employee to employer directing that wage deductions accrue in future for certain purposes, including voluntary or revocable deductions to financial institutions. [Wis. Stat.](#) § 241.09.
 - c. Revocable assignment may be renewed for period not to exceed six months if
 - (1) Original authorization contained notice of customer's right to revoke; and
 - (2) Before expiration, merchant mails notice to customer, stating that
 - (a) Assignment is revocable, and
 - (b) Assignment continues to run for not more than six additional months unless notice of revocation received.
4. No consumer credit transaction may include confession-of-judgment clause. [Wis. Stat.](#) § 422.405. A confession of judgment is a device, usually in a contract, in which a debtor agrees to allow a creditor to obtain a judgment against the debtor on nonoccurrence of a payment. See Cornell L. Sch., Legal Info. Inst., *Confession of Judgment*, https://www.law.cornell.edu/wex/confession_of_judgment (last visited May 16, 2022).

5. In consumer credit sales, consumer leases, and interlocking consumer loans, assignee of rights of creditor is subject to all claims and defenses of customer against assignor arising out of transaction. [Wis. Stat.](#) §§ 422.407, 422.408.
 - a. Act provides assignees with ability to agree with customer not to assert against assignee a claim or defense arising out of transaction; however, see Federal Trade Commission (FTC) Notice of Preservation of Consumer Claims and Defenses, which permits no such agreement on limitation of claims and defenses. 16 [C.F.R.](#) § 433.2.
 - b. Per [Wis. Stat.](#) § 422.408, *interlocking consumer loan* exists if creditor knows or has reason to know that part of proceeds of loan to be used to pay part of customer's obligations to seller or lessor, and if lender
 - (1) Is related to seller or lessor;
 - (2) Supplies documents to seller or lessor, or seller or lessor prepares documents used to evidence loan;
 - (3) Directly or indirectly pays seller or lessor commission;
 - (4) Has recourse to seller or lessor for loan;
 - (5) Has knowledge that seller or lessor fails to perform its contracts; or
 - (6) Makes loan in excess of \$100 pursuant to credit card to purchase if seller has contractual relationship with issuer and disbursement is direct to seller or lessor.
 - c. FTC rules on preservation of consumer claims and defenses provide broad coverage of consumer sales and leases and certain purchase-money loans. *See* 16 [C.F.R.](#) § 433.2.
 - (1) Rules require conspicuous notice of preservation of claims and defenses to be placed on agreement evidencing obligation.
 - (2) Assignee's liability may extend to entire principal balance of contract and finance charges paid under contract.
6. Customer authorized to pay merchant under contract until customer receives notification of assignment of rights to payment. [Wis. Stat.](#) § 422.409.
7. Except as noted below, no term of agreement may provide for payment by customer of attorney fees. [Wis. Stat.](#) § 422.411.
 - a. In transactions for acquiring or refinancing residential real property, secured by first lien or equivalent security interest and on which annual percentage rate is 12% or less, creditor may contract for reasonable fees payable to licensed attorney who is not employee of creditor; fees must not exceed 5% of amount of judgment entered or \$100 if no judgment entered (*see also infra* § 16.24). [Wis. Stat.](#) § 422.411(2).

- b. Lenders licensed under [Wis. Stat.](#) § 138.09 may contract for payment of reasonable attorney fees actually incurred to foreclose security interest in residential real estate if fees are payable to attorney who is not employee of creditor and fees do not exceed 5% of amount of judgment entered or \$100 if no judgment and dispute is settled. [Wis. Stat.](#) § 422.411(2m).
8. If default, no charges may be imposed on customer other than reasonable expenses incurred in disposition of collateral or goods subject to a motor vehicle consumer lease and other charges as specifically authorized by [Wis. Stat.](#) chs. 421–427 and 429. [Wis. Stat.](#) § 422.413(1).

Per [Wis. Stat.](#) § 422.413(2g), if collateral is motor vehicle, trailer, snowmobile, boat, aircraft, mobile home, or manufactured home, may provide for recovery of reasonable and bona fide expenses for

- a. Taking and holding collateral if paid to persons unrelated to creditor;
 - b. Travel and transportation of creditor in taking possession of collateral; and
 - c. If collateral is not redeemed, greater of the expenses in sub. (a), *supra*, or all expenses of preparing collateral for sale if paid to unrelated third parties and limited to
 - (1) Up to \$100 for cleaning and restoring collateral's appearance,
 - (2) Up to \$250 for repairing damage to collateral if covered by insurance, and
 - (3) Up to \$200 for mechanical repairs.
9. Per [Wis. Stat.](#) § 422.415, except as permitted by Act, no creditor may make any change in open-end credit plans adverse to interests of customer with respect to any outstanding balances or imposing or altering charge permitted under [Wis. Stat.](#) § 422.202(2m); changes may be made if any of the following conditions are met:
- a. Change required by legislation, regulation, or administrative rules;
 - b. Change made within three months after March 1, 1973;
 - c. Creditor mails or otherwise delivers written disclosure of proposed change at least 90 days before effective date of change; or
 - d. Customer agrees in writing to change.
10. Any person may terminate liability for future credit extensions under open-end credit plan in which more than one person is obligated. [Wis. Stat.](#) § 422.4155.
- a. Must give creditor notice of termination of liability.
 - b. Personal liability for future credit extensions continues for loans extended or purchases made under plan for 15 business days after creditor's receipt of notice.

11. Act restricts property that may be taken as collateral in transactions. [Wis. Stat.](#) § 422.417(1); *Bank of Barron v. Gieseke*, 169 Wis. 2d 437 (Ct. App. 1992).
 - a. In consumer credit sales, seller may take security interest in
 - (1) Property sold;
 - (2) Goods upon which property sold is installed or annexed or upon which services are performed, if obligation secured is \$500 or more;
 - (3) Real property to which property sold is affixed, or which is maintained, repaired, or improved as result of sale, if obligation is \$1,000 or more, *Bank of Barron*, 169 Wis. 2d 437; and
 - (4) Goods of consumer that are subject of prior transaction with seller that is consolidated with sale.
 - b. For consumer leases, except as otherwise provided in [Wis. Stat.](#) § 429.205 with respect to motor vehicle lease, lessor cannot take security interest in any property of customer other than that leased (does not prohibit taking security interest in cash security deposit for consumer lease of motor vehicle). [Wis. Stat.](#) § 422.417(2).
 - c. For consumer loans
 - (1) Lender cannot take security interest, other than purchase-money security interest, in customer's or customer's dependent's clothing, dining table and chairs, refrigerator, heating stove, cooking stove, radio, bed and bedding, couch and chairs, cooking utensils and kitchenware, or real property if obligation less than \$1,000. [Wis. Stat.](#) § 422.417(3).
 - (2) Lender must not take nonpossessory security interest in household goods other than purchase-money security interest. 16 [C.F.R.](#) §§ 444.1–.5.
12. Under [Wis. Stat.](#) § 422.419, agreements cannot authorize
 - a. Entry of customer's dwelling or commission of any breach of peace in course of taking possession of collateral,
 - b. Waiver of any right of action by customer against merchant for illegal acts committed in course of taking possession of collateral, or
 - c. Appointment of merchant as customer's agent for taking possession of collateral.
13. Variable rate transactions authorized. *See* 1983 Wis. Act 389.
 - a. *Variable rate transaction* is any open-end credit plan and any consumer credit transaction other than open-end credit plan, the terms of which permit rate of finance charge to be adjusted from time to time during term of plan or transaction other than adjustment through operation of *punch-through mechanism* or certain authorized changes under [Wis. Stat.](#) § 422.415. [Wis. Stat.](#) § 422.421(1)(c).

- b. Interest rate adjustments may be based on approved index or on other than approved index; Act sets forth specific disclosure requirements in each case. [Wis. Stat.](#) § 422.421(3), (4).
- c. In certain cases, when interest rate adjustment not based on changes in approved index, creditor must mail or deliver to customer notice of change in interest rate. [Wis. Stat.](#) § 422.421(4), (5).

IV. REMEDIES, PENALTIES, AND ENFORCEMENT OF SECURITY INTERESTS [§ 16.586]

A. Creditors' Remedies [§ 16.587]

- 1. To commence action to collect on consumer credit transaction, default must occur. [Wis. Stat.](#) § 425.103(1).
- 2. *Default* is defined by Act and controls all consumer credit transactions. [Wis. Stat.](#) § 425.103(2).
 - a. For open-end credit transactions, default in payment occurs when customer fails to pay when due on 2 occasions within any 12-month period. [Wis. Stat.](#) § 425.103(2)(b).
 - b. Per [Wis. Stat.](#) § 425.103(2)(a), for closed-end transactions, default means any of the following:
 - (1) If interval between scheduled payments is two months or less:
 - (a) To have outstanding amount exceeding 1 full payment that has remained unpaid for more than 10 days after scheduled or deferred due date, or
 - (b) To fail to pay first or last payment within 40 days after its scheduled or deferred due date.
 - (2) If interval between scheduled payments is more than 2 months, to have all or part of one scheduled payment unpaid for more than 60 days after its scheduled or deferred due date.
 - (3) If transaction to be repaid in single payment, to have all or part of payment unpaid for more than 40 days after its due date.
 - c. Under [Wis. Stat.](#) § 425.103(2)(c), default also occurs with failure to observe any covenant of transaction if this breach
 - (1) Materially impairs condition, value, or protection of merchant's right in collateral or goods subject to transaction; or
 - (2) Materially impairs consumer's ability to pay amounts due.
 - d. Default also means, regarding an installment loan not secured by a motor vehicle made by a licensee under [Wis. Stat.](#) § 138.09 or regarding a payday loan not secured by a motor vehicle made by a licensee under [Wis. Stat.](#) § 138.14, to have outstanding an amount of

- one full payment or more that has remained unpaid for more than 10 days after the scheduled or deferred due date. [Wis. Stat.](#) § 425.103(2)(am).
- e. Default also occurs, regarding a motor vehicle consumer lease or a consumer credit sale of a motor vehicle, when a customer makes a material false statement in the customer's credit application that precedes the consumer credit transaction. [Wis. Stat.](#) § 425.103(2)(bm).
3. If default occurs, customer must be notified of default before any action taken; customer must also be informed of any right to cure default. [Wis. Stat.](#) § 425.104.
- a. Under [Wis. Stat.](#) § 425.105, if right to cure default available, customer may cure, within 15 days after notice given, by
 - (1) Tendering amount of all unpaid installments due at time of tender, without acceleration, plus any unpaid delinquency or deferral charges; and
 - (2) Tendering performance necessary to cure any default other than nonpayment of amounts due.
 - b. Cure of default restores customer to rights under agreement as though no default had occurred.
 - c. Right to cure does not exist if twice during preceding 12 months
 - (1) Customer was in default on same transaction,
 - (2) Notice of right to cure was given, and
 - (3) Customer cured default.
 - d. If entire obligation past due and fully owed, no right to cure. *Rosendale State Bank v. Schultz*, 123 Wis. 2d 195 (Ct. App. 1985). But see *Bahena v. Jefferson Capital Systems, LLC*, 363 F. Supp. 3d 914 (W.D. Wis. 2019), in which the court held that eliminating the notice-of-right-to-cure requirement for debt buyers would allow creditors to skirt the notice-of-right-to-cure requirement entirely simply by selling their charged-off accounts to debt buyers.
4. In general, creditor cannot accelerate maturity, commence any action, or demand or take possession of collateral, unless customer is in default, notice of default is given, and, when required, time for customer's right to cure has expired.
5. Per [Wis. Stat.](#) § 425.104, notice of right to cure default must contain
- a. Creditor's name, address, and telephone number; and
 - b. Identification of transaction, including
 - (1) Nature of alleged default;

- (2) Statement of total payment, including delinquency charges or other performance necessary to cure default;
 - (3) Date when amount must be paid or performance tendered; and
 - (4) Name, address, and telephone number of person to whom payment must be made.
6. Per [Wis. Stat.](#) § 425.206, generally, three exceptions to rule that merchant cannot accelerate maturity or commence any action unless customer defaulted and time expired for right to cure:
 - a. Voluntary surrender of collateral. [Wis. Stat.](#) § 425.204.
 - b. Action to recover collateral is commenced after default, but return day of process must be after expiration of period for cure of default. [Wis. Stat.](#) § 425.205(6).
 - c. Creditor may dispose of instruments or documents that threaten to quickly decline in value pursuant to [Wis. Stat.](#) § 409.504 and terms of security agreement, if creditor has security interest and possession of property. [Wis. Stat.](#) § 425.105(4).
7. Per [Wis. Stat.](#) § 425.106, except when creditor has valid security interest or lien in property, certain property is exempt from execution and satisfaction of judgment arising under Act, including
 - a. Unpaid earnings equivalent to greater of
 - (1) 75% of customer's earnings remaining after deductions required to be withheld by law, or
 - (2) \$15 per dependent (other than customer) per week as claimed by customer for federal income tax withholding purposes, plus 40 times federal minimum hourly wage;
 - b. Clothing of customer and dependents and certain other personal household exemptions;
 - c. Real property used as principal residence of customer or dependents, to extent fair market value minus all amounts secured by mortgages and liens is \$15,000 or less, [Wis. Stat.](#) § 425.106(1)(c); and
 - d. Earnings or other assets required to be paid as restitution under [Wis. Stat.](#) § 973.20.
8. When marital property involved, each spouse may claim exemptions specified.
 - a. Each spouse entitled to personal residence exemption not exceeding \$15,000.
 - b. Exemption may be combined with other spouse's exemption in same property or applied to different property included in same exemption.
9. Pursuant to [Wis. Stat.](#) § 425.109, complaint for cause of action arising from consumer credit transaction must include all the following:
 - a. Identification of transaction.

- b. Description of collateral or leased goods for which recovery sought.
 - c. Specification of facts constituting alleged default.
 - d. Actual estimated amount (in U.S. dollars or foreign currency) that merchant alleges he or she is entitled to recover, and figures necessary for computation of amount. *Household Fin. Corp. v. Kohl*, 173 Wis. 2d 798 (Ct. App. 1993); *see also Bank One, NA v. Ofojebe*, 2005 WI App 151, 284 Wis. 2d 510.
 - e. Except in case of consumer lease, statement that customer has right to redeem collateral, and estimated amount required to redeem.
 - f. Except in case of consumer lease, estimated amount of any deficiency claim available to creditor after disposition of collateral recovered or that creditor seeks to recover and intends to assert.
 - g. If customer has right to cure default, total payment or other performance necessary to cure default and date by which it must be made.
 - h. Copy of any writings evidencing transaction.
 - i. The scope of the language of [Wis. Stat. § 425.102](#) bars a consumer from bringing a claim of unconscionability pursuant to [Wis. Stat. § 425.107](#) except in response to “actions or other proceedings brought by a creditor” as contemplated by [Wis. Stat. § 425.102](#). *See Duncan v. Asset Recovery Specialists, Inc.*, 2022 WI 1, 400 Wis. 2d 1 (finding that the terms “actions” or “other proceedings,” within the context of Wisconsin Consumer Act, refer to creditor-initiated litigation or other legal processes similar to litigation pursued by a creditor
10. Arbitration clauses might not be enforceable. *Wisconsin Auto Title Loans, Inc. v. Jones*, 2006 WI 53, 290 Wis. 2d 514.

NOTE: The court of appeals applied the criteria set forth in *Wisconsin Auto Title Loans* to determine unconscionability in the credit card context in *Coady v. Cross Country Bank*, 2007 WI App 26, 299 Wis. 2d 420. The court (applying Wisconsin law, notwithstanding Delaware choice-of-law provision) held that Cross Country’s arbitration provision was unconscionable, noting several relevant factors, both procedural (unsophisticated customers, unequal bargaining power, small print on contract, defendant drafted the contract, defendant solicited the customers, defendant did not provide a copy of the contract at the time of application) and substantive (class-wide relief precluded under the WCA). But see *Cottonwood Financial, Ltd. v. Estes*, 2012 WI App 12, ¶ 2, 339 Wis. 2d 472, holding that a payday loan provision requiring arbitration and prohibiting a class action on behalf of the consumer is not unconscionable, based in part on the U.S. Supreme Court’s decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011) (holding that Federal Arbitration Act preempted state law requiring availability of classwide arbitration). *Concepcion*’s holding may have invalidated [Wis. Stat. § 426.110\(1\)](#) (recognizing a consumer’s right to “bring a civil action on behalf of himself or herself and all persons similarly situated”).

B. Enforcement of Security Interests in Collateral [§ 16.588]

1. Alternative procedures are available to enforce security interests in collateral.
2. After default and expiration of cure period, creditor may commence action to recover collateral or goods subject to consumer lease or to reduce claim to judgment; judgment may provide for right to possession of collateral or leased goods and for deficiency (subject to restrictions on deficiency judgment under [Wis. Stat. § 425.209](#)). [Wis. Stat. § 425.203](#).
 - a. Per [Wis. Stat. § 425.203\(2\)](#), if creditor obtains such judgment, it may
 - (1) Have execution issue to recover property, or
 - (2) Exercise nonjudicial recovery rights over collateral subject to [Wis. Stat. § 425.206](#).
 - b. After recovery of collateral, creditor may
 - (1) Retain collateral in full satisfaction of obligation, in which case judgment must be satisfied; or
 - (2) Dispose of collateral pursuant to [Wis. Stat. § 409.504](#); creditor must apply to court to confirm sale or other disposition.
 - c. Creditor was allowed to sue for a money judgment after successfully obtaining a judgment for replevin when collateral was never recovered because a creditor's remedies are cumulative. *Ford Motor Co. v. Heinrich*, No. 2010AP2591, 2011 WL 5453316, ¶ 10 (Wis. Ct. App. Nov. 1, 2011) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).
 - d. In case of consumer lease, after recovery of goods pursuant to judgment, creditor must dispose of them to obtain deficiency. [Wis. Stat. § 425.203\(4\)](#).
3. Alternatively, creditor seeking possession of collateral or goods subject to consumer lease may commence action for replevin of collateral or leased goods. [Wis. Stat. § 425.205](#).
 - a. Replevin action follows procedures for small claims actions outlined in [Wis. Stat. ch. 799](#), irrespective of value of collateral or leased goods, except that
 - (1) Action must be commenced upon request of officer or employee of merchant on merchant's behalf;
 - (2) Process issued by clerk of court;
 - (3) Form of summons and complaint is specified by statute and must include description of collateral or leased goods sought to be recovered;
 - (4) Service by mail under [Wis. Stat. § 799.12\(3\)](#) must be certified, return receipt requested;
 - (5) Customer has right to hearing on return date and may plead orally; if no appearance, judgment may be entered; and

- (6) Judgment obtained under this section determines only right to possession of collateral or leased goods; judgment does not bar later action for damages or deficiency.
- b. Upon entry of judgment, creditor has right to either
 - (1) Have execution issue, or
 - (2) Immediately exercise nonjudicial recovery rights.
4. Self-help repossession of motor vehicles (defined in [Wis. Stat.](#) § 218.0101(22) as “any motor-driven vehicle required to be registered under [[Wis. Stat.](#)] ch. 341 except mopeds”) is allowed, provided that a notice that meets certain standards (set out below) is sent to the debtor, and local law enforcement is notified before the actual repossession, and further provided that the debtor fails to demand a court hearing within 15 days after the notice, so long as the repossession can be accomplished without a breach of the peace. [Wis. Stat.](#) §§ 425.202(2), 425.206.
 - a. Per [Wis. Stat.](#) § 425.205(1g)(a), the notice to the customer must contain all the following information:
 - (1) The name, address, and telephone number of the merchant, a brief identification of the consumer credit transaction, and a brief description of the collateral or goods;
 - (2) A statement that, as a result of the customer’s default on the consumer credit transaction, the merchant may have the right to take possession of the collateral or goods without further notice or court proceeding;
 - (3) A statement that if the customer is not in default or objects to the merchant’s right to take possession of the collateral or goods, the customer may, no later than 15 days after the merchant has given the notice, demand that the merchant proceed in court by notifying the merchant in writing; and
 - (4) A statement that if the merchant proceeds in court, the customer may be required to pay court costs and attorney fees.
 - b. The information required under para. a., *supra*, may be combined with any other notice, except that if the customer has a right to cure under [Wis. Stat.](#) § 425.105, the information required under para. a., *supra*, must be combined with the notice of right to cure under [Wis. Stat.](#) § 425.104.
 - c. A merchant is presumed to have given notice under para. a., *supra*, if the merchant sent the notice by certified or registered mail.
 - d. Notice to law enforcement
 - (1) *Law enforcement agency* means the police department, combined protective services department under [Wis. Stat.](#) § 60.553, 61.66, or 62.13(2e), or sheriff, that has primary responsibility for providing police protection services in the city, village, or town in which a repossession is expected to occur. [Wis. Stat.](#) § 425.2065(1).

- (2) A merchant who repossesses motor vehicle collateral or goods subject to a motor vehicle consumer lease under [Wis. Stat. § 425.206\(1\)\(d\)](#), or a person who repossesses such collateral or goods on behalf of the merchant, must notify, orally or in writing, the law enforcement agency about the repossession. The notification must include the names of the customer, the merchant, and, if applicable, the person who repossesses the collateral or goods on behalf of the merchant. The notification must also include a description of the collateral or goods. Notification must be given before the repossession occurs. [Wis. Stat. § 425.2065\(2\)](#).

C. Additional Remedies Available Under Act [§ 16.589]

1. Customer has right to voluntarily surrender interest in collateral; replevin proceeding not necessary if voluntary surrender occurs. [Wis. Stat. § 425.204](#).
 - a. Obligations of parties regarding collateral voluntarily surrendered governed by [Wis. Stat. §§ 409.601–.628](#) for disposition of property.
 - b. Surrender not voluntary if made pursuant to request or demand of creditor for surrender or if made pursuant to threat, statement, or notice by merchant that creditor intends to take possession of collateral other than a notice under [Wis. Stat. § 425.205\(1g\)\(a\)](#) (motor vehicle self-help repossession).
2. If court finds merchant will likely recover possession of collateral and customer is about to act in manner that impairs merchant's prospect for realization of its security interest, court may issue restraining order to protect collateral or leased goods. [Wis. Stat. § 425.207\(1\)](#).
3. If merchant reasonably believes that customer has abandoned collateral, merchant may take possession of collateral and preserve it. [Wis. Stat. § 425.207\(2\)](#).
 - a. Customer may recover abandoned collateral upon request unless, at the time of request, customer had voluntarily surrendered goods, judgment had been entered for recovery of collateral, or merchant has exercised the right to possession under [Wis. Stat. § 425.206\(1\)\(d\)](#) (motor vehicle self-help repossession).
 - b. Merchant taking possession of collateral must notify customer of such action and of customer's right to recover collateral.
4. Merchant cannot take possession of collateral or leased goods by other than legal process except when
 - a. Customer surrenders collateral or leased goods,
 - b. Judgment is entered for recovery under [Wis. Stat. § 425.205](#) or possession under [Wis. Stat. § 425.203](#),
 - c. Merchant takes possession under [Wis. Stat. § 425.207\(2\)](#), or
 - d. Merchant has exercised right to possession under [Wis. Stat. § 425.206\(1\)\(d\)](#) (motor vehicle self-help repossession).

5. In taking possession, must not commit a breach of peace, and must not enter residential dwelling except by voluntary request of customer. *Hollibush v. Ford Motor Credit Co.*, 179 Wis. 2d 799 (Ct. App. 1993); *see also Duncan v. Asset Recovery Specialists, Inc.*, 2022 WI 1, 400 Wis. 2d 1 (holding that garage in customer’s apartment building was part of the “dwelling used by the customer as a residence” pursuant to [Wis. Stat.](#) § 425.206(2)).
6. Per [Wis. Stat.](#) § 425.208, for 15 days following exercise of nonjudicial enforcement rights or issuance of process, customer is entitled to redeem goods by tendering
 - a. All unpaid amounts, including any unpaid delinquency or deferral charges due at time of tender, without acceleration;
 - b. Performance necessary to cure any default other than nonpayment of amounts due; and
 - c. Court costs, filing and service fees, and bond premium charges incurred by the creditor, plus
 - (1) If writing evidencing transaction provides, expenses creditor is entitled to recover under [Wis. Stat.](#) § 422.413(2g)(a) and (b), and
 - (2) Performance deposit in amount of three scheduled installments (or minimum payments in case of open-end credit plan) or one-third of total obligation remaining unpaid, whichever is less.

V. ADDITIONAL CONSUMER PROVISIONS [§ 16.590]

A. Consumer Approval Transactions [§ 16.591]

1. Per [Wis. Stat.](#) § 423.201, *consumer approval transaction* means a consumer transaction other than a sale or lease or listing for sale of real property or a sale of goods at auction that
 - a. Is initiated by face-to-face solicitation away from a regular place of business of the merchant or by mail or telephone solicitation directed to the particular customer, and
 - b. Is consummated or in which the customer’s offer to contract or other writing evidencing the transaction is received by the merchant away from a regular place of business of the merchant and involves the extension of credit or is a cash transaction in which the amount the customer pays exceeds \$25.
2. Consumer approval transaction does not include a catalog sale that is not accompanied by any other solicitation or a consumer loan conducted and consummated entirely by mail.
3. Customer has three-day right to cancel consumer approval transaction. [Wis. Stat.](#) § 423.202.
4. Merchant must provide customer with two copies of notice of right to cancel. [Wis. Stat.](#) § 423.203.

B. Debt Collections [§ 16.592]

1. Act prohibits debt collectors from using certain procedures against customer and customer's dependents, including threats of violence, prosecution, disclosure of false information, and communication with employer. [Wis. Stat.](#) § 427.104.
2. Wisconsin court has jurisdiction when debtor brings action under section seeking remedy for creditor's collection actions on a debt discharged in bankruptcy. *Gonzales v. AM Cmty. Credit Union*, 150 Wis. 2d 773 (Ct. App. 1989).

C. First Lien Real Estate Loans [§ 16.593]

1. Loans not subject to subchapter II of [Wis. Stat.](#) ch. 428, if secured by first lien mortgage or equivalent security interest with amount financed \$25,000 or less, are governed by subchapter I of [Wis. Stat.](#) ch. 428 (excluded from coverage under [Wis. Stat.](#) chs. 421–427, *see supra* § 16.7, 6.g.). [Wis. Stat.](#) § 428.101.
2. [Wis. Stat.](#) chs. 421–427 of Act do not apply to loans subject to [Wis. Stat.](#) ch. 428. [Wis. Stat.](#) § 421.202(7).
3. A second mortgage may qualify as an *equivalent security interest*. 63 Wis. Op. Att'y Gen. 557 (1974).
4. A time-share purchase agreement qualifies as a loan under [Wis. Stat.](#) ch. 428 even though no funds are advanced, if agreement is with the time-share developer. *Ott v. Peppertree Resort Villas, Inc.*, 2006 WI App 77, 292 Wis. 2d 173.
5. Limitations
 - a. No delinquency charges on installments paid before 10th day after due date. [Wis. Stat.](#) § 428.103(1)(a).
 - b. Cosigner notice, consistent with [Wis. Stat.](#) § 422.305, is required. [Wis. Stat.](#) § 428.103(1)(b).
 - c. Certain restrictions on debt collection activities. [Wis. Stat.](#) § 428.103(1)(c).
 - d. No security interest in household goods or furnishings, other than fixtures. [Wis. Stat.](#) § 428.103(1)(d).
 - e. Chargeable attorney fees are limited. [Wis. Stat.](#) § 428.103(1)(e).

D. Other Mortgage Loans [§ 16.594]

1. Applies to a *covered loan*, defined as consumer credit mortgage loan transaction other than an open-end credit plan or reverse mortgage, and having certain characteristics. [Wis. Stat.](#) § 428.202(2).
2. Prohibitions on and requirements of lenders and assignees, per [Wis. Stat.](#) § 428.203:
 - a. Limits on balloon payments,

- b. Limits on demanding payment in full before maturity,
 - c. No planned negative amortization,
 - d. No default interest rate,
 - e. No loan for advanced loan payments,
 - f. No asset-based loans—customer must have ability to repay,
 - g. Limits on refinancing previous covered loan,
 - h. Limits on loans to finance home improvements,
 - i. Limits on loans for single premium credit insurance products,
 - j. No refinancing of subsidized low-rate loans, and
 - k. Lender cannot contract with unlicensed mortgage bankers or brokers.
3. False statements in documents related to loan are prohibited. [Wis. Stat.](#) § 428.204.
 4. Lender must not encourage or recommend default on existing loan or other obligation. [Wis. Stat.](#) § 428.206.
 5. Limits on prepayment penalties. [Wis. Stat.](#) § 428.207.
 6. Specific disclosure to customer required, in writing, at least three business days before loan is made. [Wis. Stat.](#) § 428.208.
 7. State has exclusive authority to regulate covered loans. [Wis. Stat.](#) § 428.209.
 8. Exempts certain property from collection on a debt arising from a covered loan. [Wis. Stat.](#) § 428.2095.
 9. [Wis. Stat.](#) § 428.210 sets forth the procedures for investigation and enforcement of the subchapter.
 10. Subchapter does not apply to any state-chartered or federally chartered bank, trust company, savings and loan association, savings bank, or credit union, or to any subsidiary of such a bank, trust company, savings and loan association, savings bank, or credit union. [Wis. Stat.](#) § 428.211.

E. Motor Vehicle Consumer Leases [§ 16.595]

1. Motor vehicle consumer leases with total lease obligations of \$25,000 or less are covered by [Wis. Stat.](#) ch. 429. [Wis. Stat.](#) § 429.104(9).
2. Disclosures and limits on practices

- a. Blank sample lease form must be available for review before lease execution. [Wis. Stat. § 429.201](#).
- b. Advance payments or trade-ins as part of lease are subject to refund or return if lease application not approved. [Wis. Stat. § 429.202](#).
- c. Per [Wis. Stat. § 429.204](#), if lessee is responsible for amounts beyond insurance coverage in event of vehicle loss or destruction (*gap amount*), lease must disclose
 - (1) That lessee is responsible for gap amount;
 - (2) Fact and amount of separate charge for lessor's waiver of rights to gap amount, and fact of lessor's agreement to waive rights; and
 - (3) That lessee may purchase coverage from insurer in lieu of separate charge.
- d. Lease cannot create security interest in personal or real property of lessee, other than security deposit, prepayment, right of set-off, or interest in vehicle. [Wis. Stat. § 429.205](#).
- e. Per [Wis. Stat. § 429.206](#), upon early termination, *realized value* of vehicle is determined by one of following:
 - (1) Mutual agreement;
 - (2) Upon loss or destruction of vehicle, sum of insurance proceeds and amounts received from any other party in payment for loss;
 - (3) Appraisal; or
 - (4) Greater of
 - (a) Price on commercially reasonable disposition, minus reasonable expenses; or
 - (b) Highest bona fide offer received.
- f. Per [Wis. Stat. § 429.207](#), lessee has right to terminate at any time; upon early termination, lessee obligation must not exceed sum of following:
 - (1) Accrued unpaid rent payments.
 - (2) Any other amounts unpaid by lessee other than excess mileage charges.
 - (3) Official fees and taxes for termination.
 - (4) Any early termination or disposition fee in lease, not to exceed average payment amount in a monthly period.
 - (5) Reasonable costs for retaking, storage, sale preparation, and sale.

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- (6) Any positive amount determined by subtracting realized value from sum of balances subject to lease charge and lease charge earned for period in which termination occurs, calculated as specified in Act.
 - g. Under [Wis. Stat.](#) § 429.208, the procedure for charging for excessive wear and tear includes notice and itemized bill.
 - (1) Lessee has seven days after hand delivery or nine days after mailing of bill to obtain and deliver counter-inspection report and estimate.
 - (2) If report submitted and charges tendered, counter-report is binding on lessor.
 - h. Consumer lease form disclosures required under [Wis. Stat.](#) § 429.203 include
 - (1) Caption “Motor Vehicle Lease Agreement”;
 - (2) Statement if no liability insurance is provided on vehicle;
 - (3) “Notice to Lessee” regarding ownership rights, costs on early termination, and right to copy of lease;
 - (4) All federal disclosures and the following:
 - (a) Gross capitalized cost—agreed-on vehicle value and the amount for all items over the lease term;
 - (b) Capitalized cost reduction—amount of net rebate, trade-in allowance, noncash credit, or cash that reduces gross capitalized cost;
 - (c) Adjusted capitalized cost—agreed-on amount serving as basis to determine base periodic payment;
 - (d) Residual value—vehicle value at lease end used in calculating base periodic payment;
 - (e) Statement of lease charge in payment and separate statement of depreciation portion of payments;
 - (f) Statement on early termination; and

NOTE: [Wis. Stat.](#) § 429.203(3)(f) (1995–96) was applicable to leases entered into before January 3, 1998, and required disclosure of the sum of total payments, capitalized cost reduction, and other nonrefundable payments.

 - (g) Statement of standards applied in determining excess wear and tear; must comply with federal standards.
 - i. Must deliver completed, signed copy of lease.

- j. Must advise lessee of right to purchase motor vehicle insurance policy or substitute policy with coverage similar to that policy charged for in lease.
- k. If insurance policy purchased in connection with lease, may amortize cost over lease term or other agreed-on period.
- l. Upon request and at no charge, once in a 12-month period, lessor must provide projected obligation in event of early termination.

VI. EFFECT OF WISCONSIN MARITAL PROPERTY ACT (WMPA) ON CONSUMER CREDIT TRANSACTIONS [§ 16.596]

A. Tattletale Notice [§ 16.597]

Notice must be provided to nonapplicant spouse in connection with granting of credit subject to WMPA that may create family-purpose obligation, *see infra* § [16.35](#).

1. Notice of extension of credit must be provided to nonapplicant spouse before date any payment due. [Wis. Stat.](#) § 766.56(3)(b).
2. Under [Wis. Stat.](#) § 766.56(3)(b), notice may consist of
 - a. Copy of instrument, document, agreement, or contract evidencing obligation;
 - b. Copy of any required credit disclosures given to applicant spouse; or
 - c. Separate writing describing credit granted.
3. Notice is considered given on date mailed to nonapplicant spouse at address given by applicant spouse; if applicant spouse indicates that spouses live at same address, notice may be given in envelope addressed to nonapplicant spouse or both spouses at that address. [Wis. Stat.](#) § 766.56(3)(b).
4. Notice is considered given if nonapplicant spouse has actual knowledge of credit extension or if notice requirement waived in writing. [Wis. Stat.](#) § 766.56(3)(c).
5. Creditor's failure to give notice does not prevent classification of obligation as marital and does not affect creditor's right to recover from marital estate. *Park Bank-W. v. Mueller*, 151 Wis. 2d 476 (Ct. App. 1989).

B. Marital Property Notice [§ 16.598]

Creditor must include in every written application for credit extension governed by WMPA notice that no provision of marital property agreement, unilateral statement, or court decree under [Wis. Stat.](#) § 766.70 adversely affects interests of creditor unless creditor is furnished with copy of agreement, statement, or decree or has knowledge of adverse provision before credit granted. [Wis. Stat.](#) § 766.56(2)(b).

C. Consumer Remedies Available to Nonapplicant Spouse [§ 16.599]

Spouse of person who incurs family-purpose obligation subject to WMPA has same remedies under WMPA as incurring spouse. [Wis. Stat.](#) § 766.565(3).

D. Explanation of Personal Obligation [§ 16.600]

Explanation of personal obligation required under [Wis. Stat.](#) § 422.305 does not apply to spouse of person incurring family-purpose debt unless spouse signs writing evidencing transaction or signs separate guarantee. [Wis. Stat.](#) § 766.565(4).

E. Nonapplicant Spouse's Termination Rights [§ 16.601]

Per [Wis. Stat.](#) § 766.565(5), spouse of person who establishes open-end credit plan that may result in family-purpose obligation may terminate plan subject to the following qualifications:

1. Must give written notice of termination.
2. Creditor may include provision in plan document permitting creditor to declare account balance due upon receipt of termination notice.
3. Receipt of notice of termination does not affect liability of incurring spouse or availability of incurring spouse's interest in marital property or other property to satisfy obligation incurred.
4. Subject to [Wis. Stat.](#) § 422.4155(1), the terminating spouse's interest in marital property continues to be available to satisfy family-purpose obligations.

VII. SPOUSAL OBLIGATIONS UNDER WMPA [§ 16.602]

A. Fundamental Changes [§ 16.603]

1. A marital property system fundamentally changes creation and nature of creditor-debtor relationship.
2. For relationships based on contract, a number of factors relate to creditor-debtor relationship, including
 - a. Debtor's right to manage and control marital property (as well as any limitations placed on that right),
 - b. Classification of property owned by debtor and his or her spouse, and
 - c. Purpose of debt incurred.

B. Family-Purpose Presumption [§ 16.604]

WMPA creates presumption that obligation incurred by spouse during marriage, including one attributable to act or omission during marriage, is incurred in interest of marriage or family. *Lloyd v. Lloyd (In re Est. of Lloyd)*, 170 Wis. 2d 240 (Ct. App. 1992).

C. Categories of Obligations [§ 16.605]

WMPA categorizes obligations and defines property that creditor may reach in seeking to satisfy each category of obligation; general categories may be enlarged or reduced in scope by acts of creditor and debtor.

1. Support obligations

- a. Spouse has obligation to satisfy duty of support owed to other spouse or child. [Wis. Stat. § 766.55\(2\)\(a\)](#).
- b. Obligation may be satisfied from obligated spouse's individual *and* predetermination date property and all marital property. *St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100 (Ct. App. 1994).

2. Family-purpose obligations

- a. Obligation incurred by spouse in interest of marriage or family may be satisfied only from all marital property and all other property of incurring spouse. [Wis. Stat. § 766.55\(2\)\(b\)](#).
- b. All marital property, irrespective of which spouse holds title or which spouse earned or acquired it, is available to satisfy family-purpose obligation incurred by either spouse.
 - (1) Obligation incurred by spouse during marriage presumed to be for family purpose. [Wis. Stat. § 766.55\(1\)](#).
 - (2) Whether family purpose exists is question of fact based on circumstances presented.
 - (3) Statement by incurring spouse separately signed at or before obligation is incurred, stating that obligation is incurred in interest of marriage or family, is conclusive evidence of purpose. [Wis. Stat. § 766.55\(1\)](#).

3. Premarriage obligations

Obligation incurred by spouse before or during marriage that is attributable to obligation arising before marriage or to act or omission occurring before marriage may be satisfied only from property of that spouse that is not marital property and from that part of marital property that would have been property of that spouse but for the marriage. [Wis. Stat. § 766.55\(2\)\(c\)1](#).

- a. Normally would not include wages of nonobligated spouse, even though each spouse has marital property ownership interest in other spouse's wages.
- b. Act does not provide that creditor may reach debtor's one-half interest in marital property as in case with debts arising during marriage that are not family-purpose obligations; rather, creditor may reach property that would have been available *but for the marriage*, even though other spouse now has marital interest.
- c. All wages and income of obligated spouse available to satisfy debt.
- d. Examples include the following:

- (1) Support of dependents from previous marriage, even if support becomes due and owing at future time during later marriage.
 - (2) Satisfaction of credit obligation incurred by spouse before marriage for purpose unrelated to marriage or family. *See also* [Wis. Stat.](#) § 766.55(3).
4. Pre-WMPA obligations
- a. Obligation incurred by spouse that is attributable to obligation arising before January 1, 1986, or to act or omission occurring before January 1, 1986, may be satisfied only from property of that spouse that is not marital property and from that part of marital property that would have been property of that spouse but for enactment of WMPA. [Wis. Stat.](#) § 766.55(2)(c)2.
 - b. Spouse's nonmarital property may be reached as well as any marital property that would have been property of that spouse absent WMPA.
5. Other obligations during marriage
- a. Any other obligation incurred by spouse during marriage, including one attributable to act or omission during marriage, may be satisfied only from property of that spouse that is not marital property and from that spouse's interest in marital property (in that order). [Wis. Stat.](#) § 766.55(2)(d).
 - b. Non-family-purpose obligations: Must avoid family-purpose presumption.
 - c. Classification specifies order in which property must be used to satisfy obligation:
 - (1) Incurring spouse's nonmarital property must first be fully used (probably subject to any statutory exemptions) to satisfy obligation,
 - (2) Only then may spouse's one-half interest in marital property be used to satisfy obligation.
6. Tort obligations
- a. Obligation incurred by spouse during marriage and resulting from tort committed by spouse during marriage may be satisfied from that spouse's nonmarital property and from that spouse's interest in marital property. [Wis. Stat.](#) § 766.55(2)(cm).
 - b. Marital property available is limited to tortfeasor spouse's interest in marital property.

VIII. ENLARGEMENT OR REDUCTION OF CREDITORS' RIGHT TO RECOVERY [§ 16.606]

A. Actions by Creditors, Spouses, and Third Parties [§ 16.607]

Actions by creditors, spouses, and, in certain circumstances, third parties, may alter pool of assets available to satisfy obligation.

B. Secured Obligations [§ 16.608]

Rules regarding categorization of spousal obligations do not affect satisfaction of obligation of spouse from collateral securing obligation.

1. In general, if obligation fully secured and security interest properly perfected, collateral will be available to satisfy obligation irrespective of how obligation categorized.
2. To determine who may grant security interest in collateral, creditor must refer to general management and control rules set forth in WMPA, which establish the parties necessary to grant security interest in collateral of married persons. [Wis. Stat.](#) § 766.51.
3. In normal circumstances, secured creditor acquiring marital property as collateral will be bona fide purchaser if spouse granting security interest has right to manage and control the property. [Wis. Stat.](#) § 766.57.
 - a. *Purchase* includes acquisition of property by mortgage, pledge, or lien; *purchaser* gives value for property in return for binding commitment to extend credit. [Wis. Stat.](#) § 766.57(1)(b), (c).
 - b. Per [Wis. Stat.](#) § 766.57(1)(a), to become *bona fide purchaser*, creditor
 - (1) Must not knowingly be party to fraud or illegality affecting interest of spouses or other parties to transaction,
 - (2) Must not have notice of adverse claim by spouse, and
 - (3) Must have acted in good faith.
 - c. Notice of existence of marital property agreement, termination of marriage, or marriage does not affect status of bona fide purchaser.
 - d. Marital property acquired by mortgage, pledge, or lien by bona fide purchaser from spouse having right to manage and control property is acquired free of claim of other spouse and free of any claim made through or under other spouse.
4. Special considerations
 - a. For homestead property, [Wis. Stat.](#) § 706.02(1)(f) continues to require that, except for purchase-money mortgage interest, if the conveyance alienates any interest of married person, it must be signed or joined in by or on behalf of each spouse.
 - b. Security agreement or financing statement signed by one spouse is signed by debtor if that spouse acting alone has the right to manage and control property. [Wis. Stat.](#) § 409.203(4)(b).
5. General rules regarding necessary signatures for perfecting security interest in marital property, [Wis. Stat.](#) § 766.51, include:
 - a. If collateral is titled in name of one spouse only, creditor must obtain signature of that spouse.

- b. If collateral is titled in names of both spouses (*A* and *B*), creditor must obtain signatures of both spouses.
- c. If collateral is titled in names of both spouses in alternative (*A* or *B*), creditor may rely on signature of single spouse; however, preferable to obtain both signatures.
- d. If collateral is untitled (e.g., jewelry, bearer bonds), creditor may obtain signature of either spouse; preferable to obtain both signatures.
- e. If collateral is homestead property (not purchase-money situation), creditor must obtain signatures of both spouses.
- f. In purchase-money transactions, necessary to obtain signature of party (or parties) in whom property will be titled.

C. Marital Property Agreements [§ 16.609]

1. Execution of marital property agreement may expand or reduce the pool of property that creditors may reach to satisfy obligations.
2. Creditor with actual knowledge of marital property agreement provision that adversely affects creditor's interest is bound by its terms. [Wis. Stat.](#) § 766.55(4m).
 - a. Creditor must have actual knowledge when obligation to creditor is incurred, or in case of open-end credit plan, when plan was entered into.
 - b. Later-acquired knowledge will not adversely affect creditor's interest, even for renewals, extensions, modifications, or use of obligation or plan.
3. Recording marital property agreement under [Wis. Stat.](#) § 59.43(1c)(r) does not constitute actual or constructive notice to third parties. [Wis. Stat.](#) § 766.56(2)(a).

D. Unilateral Statement—Louisiana Fruits Rule [§ 16.610]

1. Spouse acting alone may execute statement that classifies income attributable to certain of spouse's property (other than marital property) as individual property. [Wis. Stat.](#) §§ 766.31, 766.59.
2. Any income of property designated in statement that accrues on or after the date that the statement becomes effective and before the statement's revocation is individual property.
3. Statement must be in writing, signed by classifying spouse, and acknowledged by notary.
4. Spouse must provide notice to other spouse within five days after signing; notice may be given by providing copy of the statement to other spouse by personal delivery or certified mail.
5. Third parties may treat unilateral statement as if it were a marital property agreement.

E. Written Consent by Creditor [§ 16.611]

A creditor may consent in writing to diminished collection rights. [Wis. Stat.](#) § 766.55(4).

F. Court Action [§ 16.612]

1. Court orders made pursuant to spousal request may affect creditor's collection rights or may change nature of spouse's obligation. [Wis. Stat.](#) § 766.70.
2. Before obligation is incurred, creditor must have actual notice of court order provision that adversely affects him or her; creditor without such notice is not bound by terms of court's order. [Wis. Stat.](#) § 766.55(4m).
3. Broad interspousal remedies may be sought that may bind subsequent creditor.

G. Statutory Individual Property Classification Agreement (SIPCA) [§ 16.613]

See [Wis. Stat.](#) § 766.587.

1. Temporary alternative classification scheme permitted spouses to classify all property owned or acquired before January 1, 1987, as individual property of each spouse (during this period, such spouses will have *no* marital property).
2. Was enforceable without disclosure of spouses' property or financial obligations.
3. Statutory form provided.
4. Had effect of marital property agreement.
5. SIPCA must have terminated on January 1, 1987; termination did not reclassify property acquired before termination, but property acquired after termination was classified under primary scheme of WMPA.

H. Statutory Terminable Individual Property Classification Agreement (STIPCA) [§ 16.614]

See [Wis. Stat.](#) § 766.589.

1. Agreement by which spouses may classify marital property as individual property of owning spouse.
2. If no disclosure of assets and liabilities before agreement, terminates three years after signing; if statutory disclosure form completed, STIPCA effective until dissolution or death.
3. May be terminated by either spouse at any time upon 30 days' written notice meeting certain requirements.
4. Has effect of marital property agreement.
5. Statutory form provided.

6. STIPCA does not affect treatment of [Wis. Stat.](#) ch. 705 joint account, including survivorship feature.

I. Statutory Terminable Marital Property Classification Agreement (STMPCA) [§ 16.615]

See [Wis. Stat.](#) § 766.588.

1. Agreement by which spouses may classify all property as marital property.
2. If no disclosure of assets and liabilities is made before agreement, agreement terminates three years after signing; if statutory disclosure form is completed, STMPCA effective until dissolution or death.
3. May be terminated by either spouse at any time upon 30 days' written notice meeting certain requirements.
4. Has effect of marital property agreement.
5. Statutory form provided.
6. STMPCA does not affect [Wis. Stat.](#) ch. 705 treatment of joint account and marital account, including survivorship features.

J. Gift Transfers [§ 16.616]

See [Wis. Stat.](#) § 766.31(10).

1. Spouses may reclassify their property by gift.
2. Creditors protected from reclassification by marital property agreement unless they have actual knowledge of agreement, but no similar protection for gift transfers.
3. Subsequent creditors may be bound unless transfer is a fraudulent conveyance under [Wis. Stat.](#) ch. 242.

K. Dissolution of Marriage [§ 16.617]

1. Unless dissolution decree provides otherwise, after dissolution of marriage, income of former spouse is no longer considered marital property; therefore, creditors cannot generally look to income of nonincurring spouse to satisfy obligation previously made in interest of marriage or family. [Wis. Stat.](#) § 766.55(2m).
2. Marital property assigned to each spouse by court decree is available to satisfy family-purpose obligation to the extent of the value of marital property on the date of decree. *Lloyd v. Lloyd (In re Est. of Lloyd)*, 170 Wis. 2d 240 (Ct. App. 1992).
3. If decree provides that nonincurring spouse is responsible for satisfaction of obligation, obligation may be satisfied as if both spouses had incurred it.

L. Domicile [§ 16.618]

1. Both spouses must be domiciled in state before WMPA generally applies.
2. When one or both spouses are not domiciled in state, WMPA generally ceases to apply.
3. Property classified as marital property in Wisconsin and available to satisfy spouse's obligation remains available even if property is moved outside state. [Wis. Stat.](#) § 766.55(7).
4. Cessation of WMPA's application when spouse no longer domiciled in Wisconsin does not, by itself, affect property, right, interest, or remedy acquired by spouse or third party under WMPA or satisfaction of obligation incurred by spouse. [Wis. Stat.](#) §§ 766.03, 766.55(7).
5. If spouse changes domicile, future income stream and property of spouse is governed by law of state where spouse domiciled.
6. Creditors relying on future income stream of nonincurring spouse may find asset unavailable under the law of another state; thus, assets available to satisfy obligation may be diminished.

NOTE: Creditors cannot be required to treat future income as community property until that income is earned. *United States v. ITT Consumer Fin. Corp.*, 816 F.2d 487 (9th Cir. 1987).

M. Death of Spouse [§ 16.619]

1. Death of spouse terminates marriage, making future income of nonincurring spouse his or her individual property.
 - a. WMPA has special rules regarding future income and property acquired by nonincurring spouse after the death of incurring spouse, in connection with satisfying family-purpose obligations incurred by decedent spouse.
 - b. WMPA sets forth two basic rules for such claims. *Lloyd v. Lloyd (In re Est. of Lloyd)*, 170 Wis. 2d 240 (Ct. App. 1992).
 - (1) If obligation is incurred by decedent spouse as a result of extension of credit by person who regularly extends credit (or as result of Wisconsin tax obligation), property that would have been available during marriage for satisfaction of obligation (including income of surviving spouse) generally continues to be available for satisfaction.
 - (2) For other types of obligations incurred by decedent spouse, the same rule applies, except that
 - (a) No income of surviving spouse is available to satisfy obligation, and
 - (b) Marital property of surviving spouse available only to the extent of its value as of the death of decedent spouse.

NOTE: This limitation parallels the rule following divorce.

2. Per [Wis. Stat.](#) § 859.18(4)(a), if decedent spouse only is obligated spouse, the following property is not generally available to satisfy obligations:
 - a. Survivorship marital property.
 - b. Joint tenancy property, subject to lien issued before death.
 - c. Deferred employment benefits from decedent spouse's employment.
 - d. Proceeds of life insurance policy insuring life of decedent spouse, not payable to decedent's estate and not assigned or payable to creditor as security.
3. Per [Wis. Stat.](#) § 859.18(4)(b), if surviving spouse only is obligated spouse, the following property is not generally available to satisfy obligations:
 - a. Decedent spouse's interest in joint tenancy property, subject to judgment liens issued before death.
 - b. Deferred employment benefits from decedent spouse's employment.
 - c. Proceeds from life insurance, *see supra* 2.d.

IX. FEDERAL FAIR DEBT COLLECTION PRACTICES ACT [§ 16.620]

A. Overview of the Act [§ 16.621]

1. The Fair Debt Collection Practices Act (FDCPA) was enacted in 1977 to curb debt collection abuses. In 1986, Congress amended the FDCPA's definition of *debt collector* to specially include attorneys who regularly engage in collection activities. 15 [U.S.C.](#) § 1692a(6).
2. More recent cases have suggested that attorneys are regularly engaged in collection activities when as little as four percent of the firm's total business involved debt collection. *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992); *see also Heintz v. Jenkins*, 514 U.S. 291 (1995).
3. While 15 [U.S.C.](#) § 1692g(d) excepts pleadings from certain notice requirements, courts are reluctant to hold that the FDCPA does not apply to litigation. *Belser v. Blatt Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 473 (7th Cir. 2007).
4. FDCPA defines *consumer debt* as the obligations of natural persons for personal, family, or household purposes. 15 [U.S.C.](#) § 1692a(3), (5).
5. FDCPA imposes strict limitations on the type of notice provided to consumer debtors.
6. With regard to replevin actions, FDCPA does not define "present right to possession," and thus repossession rights are governed by relevant state's property and contract law. In absence of FDCPA-specific rule, courts must look to state law to determine whether reposessor had present right to possess property when property was seized. *Richards v. PAR, Inc.*, 954 F.3d 965 (7th Cir. 2020).

B. Notice Requirements Under the FDCPA [§ 16.622]

1. Notice must state that communication to consumer debtor is for the purpose of collecting debt. 15 [U.S.C.](#) § 1692e(11).
2. Notice must give amount of debt and name of creditor. Notice must give consumer 30 days to dispute validity of debt. Notice must include statement that if consumer disputes debt within 30 days, the creditor will provide verification of debt. 15 [U.S.C.](#) § 1692g; *Fields v. Wilber L. Firm, P.C.*, 383 F.3d 562 (7th Cir. 2004).
3. If debtor disputes some or all of the debt, all collection activities must cease until verification of the debt is provided. In the Seventh Circuit, this does not prohibit litigation on the debt, but FTC disagrees. In *Bartlett*, Seventh Circuit approved *safe harbor* model debt notification. *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997), *cited with approval in Riddle & Assocs., P.C. v. Kelly*, 414 F.3d 832 (7th Cir. 2005).

C. Venue [§ 16.623]

FDCPA includes venue provision that limits venue to district where consumer signed the contract upon which the suit is based or where the consumer resides. 15 [U.S.C.](#) § 1692i.

D. Violations [§ 16.624]

Violation of the FDCPA entitled plaintiff to statutory damages of up to \$1,000, plus attorney fees, per action (not per violation), plus actual damages. 15 [U.S.C.](#) § 1692k; *Barber v. National Revenue Corp.*, 932 F. Supp. 1153 (W.D. Wis. 1996).

1. Statute also provides for class-action damages.
2. It is not necessary to prove the debtor or recipient was misled by the communication; only necessary to prove violation of the statute. *Tolentino v. Friedman*, 46 F.3d 645 (7th Cir. 1995).
3. Case law sets forth examples of many technical violations of the FDCPA. *See generally Berndt v. Fairfield Resorts, Inc.*, 337 F. Supp. 2d 1120 (W.D. Wis. 2004), *rev'd on other grounds*, 339 F. Supp. 2d 1064 (W.D. Wis. 2004); *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031 (W.D. Wis. 2002).

A dunning letter sent by a collector for a medical service provider, stating that the creditor's attorney fees could be recovered if the creditor had to sue, when collection of attorney fees was not legally possible, was a materially false statement in violation of the FDCPA. When such statements represent propositions that legally cannot come to pass, extrinsic evidence is not necessary to establish such a claim is actionable under the FDCPA. *Lox v. CDA, Ltd.*, 689 F.3d 818 (7th Cir. 2012).

X. NONCONSUMER CREDITOR REMEDIES [§ 16.625]**A. Garnishment [§ 16.626]**

1. Garnishment is available only as a postjudgment remedy. [Wis. Stat.](#) § 812.16(1); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Larson v. Fetherston*, 44 Wis. 2d 712 (1969).

NOTE: An attorney prosecuting under [Wis. Stat.](#) § 812.02(1)(a), which has been ruled unconstitutional as applied to prejudgment garnishment of wages and other property, may be personally liable under the Civil Rights Act, 42 [U.S.C.](#) § 1983. *U.S. Gen., Inc. v. Schroeder*, 400 F. Supp. 713 (E.D. Wis. 1975).

2. Garnishment of property and non-earnings income
 - a. Commenced as ordinary civil action unless amount is less than \$10,000. [Wis. Stat.](#) §§ 812.01(2), 799.01(1)(d)2.
 - b. Complaint must allege previous judgment against defendant and that garnishee-defendant is indebted to plaintiff. [Wis. Stat.](#) § 812.05(2).
 - c. Any number of garnishees may be added in one action. [Wis. Stat.](#) § 812.05(3).
 - d. Garnishee fee of \$3 must be served with complaint, or garnishee is not required to answer; fee for public employees is \$15. [Wis. Stat.](#) §§ 812.06, 812.42(2)(c).
 - e. Service on principal defendant must be made no later than 10 days after service on garnishee-defendant and within 60 days after filing of summons and complaint. [Wis. Stat.](#) §§ 812.04(3), 812.07.
 - f. Failure to properly serve principal defendant does not render judgment against garnishee void; however, failure to properly serve principal defendant may constitute grounds to reopen default judgment against garnishee. [Wis. Stat.](#) § 806.07; *Sprayer Supply, Inc. v. Feider*, 133 Wis. 2d 397 (Ct. App. 1986).
 - g. Garnishee-defendant's answer must address any indebtedness or possession of defendant's property. [Wis. Stat.](#) § 812.11.
 - (1) Answer should allege defenses or set-offs against indebtedness claimed by garnishee-defendant.
 - (2) Garnishee-defendant may assert defendant's exemptions or other defense.
 - (3) If wages are the subject of garnishment, garnishee-defendant must state amount of subsistence allowance to be paid to defendant.
 - (4) Property is subject to garnishment only if within possession or control of garnishee-defendant (e.g., property in auctioneer's hands is not subject to garnishment because it is under the possession and control of owner until sold). *Milwaukee Stove & Furnace Supply Co. v. Apex Heating & Cooling, Inc.*, 142 Wis. 2d 151 (Ct. App. 1987).
 - h. Plaintiff must reply to answer of garnishee-defendant, or the answer is taken as admitted. [Wis. Stat.](#) § 812.14(1).
 - i. Property exempt from execution is exempt from garnishment; certain persons are not liable as garnishee-defendants. [Wis. Stat.](#) § 812.19. If a garnishee is a financial institution, the financial institution is liable to the creditor for the property in its possession, in an

amount up to the garnishable amount in the account, as of the time the financial institution is first reasonably able to put the garnishment into effect, but no later than the second business day after the business day on which the financial institution receives the garnishee summons and complaint. [Wis. Stat.](#) § 812.19(4).

- j. Upon receiving answer indicating debt, plaintiff may request payment to clerk of court; garnishee-defendant has five days after receipt of request to make payment, or judgment may be entered for amount of indebtedness. [Wis. Stat.](#) § 812.13.
- k. Failure of garnishee-defendant to answer permits default judgment for full amount of obligation, plus costs and disbursements. [Wis. Stat.](#) § 812.11.
- l. WMPA permits creditor to pursue garnishment against spouse not incurring the underlying obligation. [Wis. Stat.](#) § 812.02(2e).

NOTE: The nonincurring spouse must be named as a defendant in either action on a principal debt or garnishment action. [Wis. Stat.](#) § 812.02.

- m. Governmental entities are not subject to garnishment, except with respect to employees' wages. 77 Wis. Op. Att'y Gen. 17 (1988).
- n. Garnishment can cover garnishee's debts "due or to become due to the debtor"; however, garnishee is not liable for contingent obligations. Future profits of debtor's accounting are contingent and, therefore, unmatured for purposes of garnishment. [Wis. Stat.](#) §§ 812.18, 812.19(1)(d); *Olen v. Phelps*, 200 Wis. 2d 155 (Ct. App. 1996).

3. Earnings garnishment

- a. *Earnings* are compensation paid or payable by garnishee for personal services, whether designated as wages, salary, commission, bonus, or otherwise, and include periodic payments under pension or retirement programs. [Wis. Stat.](#) § 812.30(7).
- b. If garnishee is not state or political subdivision, garnishment affects debtor's earnings for all pay periods beginning within 13 weeks after earnings garnishment form is served on garnishee; debtor and creditor may stipulate in writing to successive 13-week extensions if no other creditors are attempting to garnish debtor's earnings and if garnishee fee is paid for extension period. [Wis. Stat.](#) § 812.35.
- c. No earnings garnishment action may be brought to recover the amount owed by a debtor for the payment of a *payday loan*, as defined in [Wis. Stat.](#) § 138.14(1)(k).
- d. Exemptions
 - (1) 80% of debtor's disposable earnings are exempt. [Wis. Stat.](#) § 812.34(2)(a).
 - (2) Debtor's earnings are totally exempt if debtor's household income is below federal poverty line, or if debtor is eligible for, receives, or has received needs-based public assistance within the past six months. [Wis. Stat.](#) § 812.34(2)(b).
 - (3) If garnishment of 20% of debtor's disposable income results in reducing debtor's household income to below the poverty line, amount of garnishment is reduced to

that amount in excess of the poverty line before garnishment. [Wis. Stat. § 812.34\(2\)\(c\)](#).

- (4) Debtor can also obtain relief from earnings garnishment by showing court that statutory exemptions are insufficient for debtor to acquire “necessities of life” for debtor and debtor’s dependents. [Wis. Stat. § 812.38\(1\)\(b\)](#).

e. Garnishment procedure

- (1) Rather than filing summons and complaint, creditors must file a *garnishment notice*, along with filing fee. [Wis. Stat. § 812.35\(1\)](#).
- (2) Every pleading beginning a garnishment proceeding must state whether amount claimed is greater than that set forth in [Wis. Stat. § 799.01\(1\)\(d\)](#), the jurisdictional amount for small claims. [Wis. Stat. § 802.04\(1\)](#).
- (3) Clerk issues two earnings garnishment forms for each garnishee, which are prepared by creditor and served within 60 days. [Wis. Stat. § 812.35](#).
- (4) Service on debtor must occur within 60-day period and within 7 days after service on garnishee; may be made by first-class mail, certified mail, return receipt requested, or by customary means of service. [Wis. Stat. § 812.35\(3\)\(a\)](#).
- (5) Debtor also must be served with exemption notice, answer form and schedules, and worksheets; court provides forms to creditor upon filing of garnishment notice. [Wis. Stat. § 812.35\(4\)\(b\)](#).
- (6) In addition to garnishment form, creditor must tender garnishee fee of \$15 to garnishee. [Wis. Stat. §§ 812.33, 812.35\(4\)\(a\)](#).

NOTE: In addition to the \$15 fee to the garnishee, a creditor must pay a \$3 fee for each payment to the creditor after the first payment; the \$3 fee is deducted from the money delivered to the creditor. [Wis. Stat. § 812.33\(2\)](#).

- (7) Garnishee must answer within seven days if garnishee has no amount to garnish; answer is served on creditor, who in turn must file with court. [Wis. Stat. § 812.35\(5\), \(6\)](#).
- (8) If there is amount to garnish, garnishee must so notify creditor.
- (9) If other garnishments have already been served, garnishee must put those into effect after end of any existing garnishment.
- (10) Debtor may file answer at any time during garnishment period and serve on garnishee, who, in turn, serves creditor within three days; garnishee must accept debtor’s answer as binding unless it receives court order directing otherwise. [Wis. Stat. § 812.37\(2\), \(3\)](#).
- (11) Creditor may file objection to debtor’s answer and seek judicial hearing; debtor may also seek determination from court that statutory exemptions are insufficient to provide “necessities of life.” [Wis. Stat. § 812.38\(1\)](#).

(12) Stipulated extension cannot be effectuated if garnishment is served during first garnishment period by another creditor. [Wis. Stat.](#) § 812.40.

(13) Garnishment of public employee's earnings remains in effect until entire judgment is satisfied; however, public employer receives additional \$3 fee for each payment to be deducted from payment to creditor. [Wis. Stat.](#) § 812.42.

- f. If garnishee fails to pay over funds, creditor may seek judgment against garnishee for unsatisfied judgment; however, (1) garnishee is entitled to prove that wages that should have been paid over were less than judgment, thereby limiting liability, and (2) creditor must serve motion for judgment on garnishee pursuant to [Wis. Stat.](#) § 801.11. [Wis. Stat.](#) § 812.41(1); *Kenosha Hosp. & Med. Ctr. v. Garcia*, 2004 WI 105, 274 Wis. 2d 338.
- g. Retaliation against debtor by employer-garnishee is prohibited unless permitted by collective bargaining agreement; debtor can obtain reinstatement, restoration of benefits, and attorney fees. [Wis. Stat.](#) § 812.43.

B. Replevin [§ 16.627]

1. Available as ex parte prejudgment remedy when creditor can claim right to possession of personal property, such as collateral.
 - a. Must file verified complaint containing facts set forth in [Wis. Stat.](#) § 810.02.
 - b. Must know location and description of property.
 - c. Some courts require hearing, although statute does not; statute has been upheld as constitutional. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986).
 - d. Informal replevin may be possible if no breach of the peace results. *Hollibush v. Ford Motor Credit Co.*, 179 Wis. 2d 799 (Ct. App. 1993).
2. Upon review of verified complaint, court may order sheriff to take property and deliver property to plaintiff. [Wis. Stat.](#) § 810.03.
 - a. Order conditioned on presentation of bond to secure value of property and costs of wrongful replevin.
 - b. Bond required under [Wis. Stat.](#) § 810.03 indemnifies defendant, not sheriff; [Wis. Stat.](#) § 810.03 does not require that bond indemnify sheriff; therefore sheriff can require such indemnification only if there is reasonable doubt as to lawfulness of seizure. *Fillbach v. Production Credit Ass'n*, 141 Wis. 2d 767 (Ct. App. 1987).
 - c. Because defendant may reclaim property by posting bond, property must not be disposed of without further order or stipulation.
 - d. If property is in enclosure and delivery to sheriff is refused, plaintiff may apply for warrant. [Wis. Stat.](#) § 810.09.

- e. Replevin order not final adjudication of ownership; plaintiff must still proceed to obtain judgment, proving elements of replevin action. [Wis. Stat.](#) § 810.13.
3. Third parties claiming interest in property may make application for delivery of property. [Wis. Stat.](#) § 810.11.
4. Punitive damages are possible in action for wrongful detention of property. *Durham v. Pekrul*, 104 Wis. 2d 339 (1981).

C. Attachment [§ 16.628]

1. Available as prejudgment remedy after filing of summons and complaint. [Wis. Stat.](#) § 811.02.
2. Application for writ of attachment must be accompanied by affidavit showing basis for attachment. [Wis. Stat.](#) § 811.03.
 - a. In contract actions, must show removal or concealment of property or show that defendant is nonresident. [Wis. Stat.](#) § 811.03(1).
 - b. In tort actions, must show that defendant is nonresident. [Wis. Stat.](#) § 811.03(2).
 - c. In some cases, writ of attachment may issue for claims not yet due. [Wis. Stat.](#) § 811.03(3).
3. Writ requires sheriff to seize sufficient property to satisfy claim and make inventory. [Wis. Stat.](#) § 811.10(1).
 - a. Sheriff to have appraisal of property to be returned with writ. [Wis. Stat.](#) § 811.10(2).
 - b. Real estate attached by recording writ with register of deeds. [Wis. Stat.](#) § 811.11.
 - c. Property exempt from execution also exempt from attachment. [Wis. Stat.](#) §§ 811.11, 811.18.
 - d. Court may order sale of perishable property. [Wis. Stat.](#) § 811.14.
4. Bond required sufficient to secure defendant's damages. [Wis. Stat.](#) § 811.06.
 - a. Defendant may apply for additional security. [Wis. Stat.](#) § 811.07.
 - b. Defendant may seek release of attached property by posting bond. [Wis. Stat.](#) § 811.16.
5. Defendant may seek vacation or modification of writ "for any sufficient cause," including likelihood of plaintiff succeeding in case on merits. [Wis. Stat.](#) § 811.18.
6. Plaintiff must proceed to final adjudication. [Wis. Stat.](#) §§ 811.22, 811.23.
7. Third party claiming ownership of attached property may seek to intervene and may be granted discharge of attachment through summary relief, which may, in proper cases, include jury trial. [Wis. Stat.](#) § 811.26.

8. If defendant prevails in action or if action is discontinued, defendant may seek judgment for damages and may maintain action on plaintiff's bond. [Wis. Stat.](#) §§ 811.21, 811.22.
9. If sheriff has any reasonable doubt as to ownership of property, sheriff may require additional securities to indemnify sheriff from liability. [Wis. Stat.](#) § 811.13.
10. 1978 amendments sought to make [Wis. Stat.](#) ch. 811 constitutional. *Carey v. Sugar*, 425 U.S. 73 (1976); *cf. United States Gen., Inc. v. Arndt*, 417 F. Supp. 1300 (E.D. Wis. 1976).
11. U.S. Supreme Court decision has revived the debate about constitutionality of attachment laws; however, opinion suggests Wisconsin's statute is constitutional, with possible exception of its provisions regarding attachment in tort actions. *Connecticut v. Doehr*, 501 U.S. 1 (1991).
12. Changes under WMPA may permit creditor to attach marital property even though spouse is not personally liable for obligation.

NOTE: The debtor's property includes the spouse's marital property interest if the action is in connection with a married person's obligation. [Wis. Stat.](#) § 811.001(2).

D. Supplementary Remedies [§ 16.629]

1. Court commissioner, on application of creditor after judgment, may order debtor to be examined under oath as to assets. [Wis. Stat.](#) § 816.03(1).
 - a. Supplementary examination does not require unsatisfied execution, although that is one basis for order to appear for examination. [Wis. Stat.](#) § 816.03(1)(a).
 - b. Service of order to appear may be made by any manner specified in [Wis. Stat.](#) § 801.11. [Wis. Stat.](#) § 816.035(1).
 - c. Court can order that disclosed property be applied to judgment. [Wis. Stat.](#) § 816.08; *see Wis. Stat.* § 757.675(2)(h).
 - d. Spouse of judgment debtor may be compelled to submit to supplementary examination, at least as to marital assets, even if judgment debtor is in bankruptcy. *In re Moore*, 318 B.R. 679 (Bankr. W.D. Wis. 2004); *Courtyard Condo. Ass'n v. Draper*, 2001 WI App 115, 244 Wis. 2d 153.
 - e. A judgment creditor does not have the right to compel a non-judgment debtor third party to testify at supplemental proceedings. *Crown Castle USA, Inc. v. Orion Constr. Grp., LLC*, 2012 WI 29, ¶ 49, 339 Wis. 2d 252.
2. Per [Wis. Stat.](#) § 816.07, court may order debtor to post bond on proof that
 - a. Debtor has property that has not been applied to judgment, and
 - b. There is danger of debtor leaving state.

3. Court may issue body attachment for nonappearance at supplemental examination in both consumer and nonconsumer transactions. [Wis. Stat.](#) §§ 425.113(1), 816.05; *Smith v. Burns*, 65 Wis. 2d 638 (1974).
4. Court may appoint supplementary receiver who stands in debtor's shoes for purpose of liquidating debtor's assets and collecting accounts. [Wis. Stat.](#) § 816.04.
 - a. Only one receiver can be appointed at any time, but receiver may be appointed for several creditors. [Wis. Stat.](#) § 816.04.
 - b. Receiver may be required to post bond.
 - c. Judgment creditor who first obtains supplementary receiver obtains equitable lien over nonexempt property of debtor ahead of equitable lien of creditor commencing later supplementary proceeding. *Candee v. Egan*, 84 Wis. 2d 348 (1978).
 - d. Decision to appoint receiver is within court's discretion. *Tralmer Sales & Serv., Inc. v. Erickson*, 186 Wis. 2d 549 (Ct. App. 1994).
 - e. Supplementary receiver operates as collection agent for the specific judgment creditor whose interests he or she represents. *In re Badger Lines, Inc.*, 206 B.R. 521 (E.D. Wis. 1997).
 - f. Supplementary receiver's lien is effective on date that order requiring debtor's appearance at supplementary examination is served on debtor. No further steps necessary to perfect receiver's lien. *In re Badger Lines, Inc.*, 224 Wis. 2d 646, 660–61 (1999), *on remand*, 202 F.3d 945 (7th Cir. 2000).

NOTE: See *Associated Bank N.A. v. Collier*, 2014 WI 62, ¶ 59, 355 Wis. 2d 343, concluding that supplemental proceedings under [Wis. Stat.](#) ch. 816 are a discovery tool in aid of judgment collection and that service on the debtor of an order to appear for supplemental proceedings by a judgment creditor does not give rise to a blanket lien on all the debtor's property in favor of the judgment creditor.

E. Execution [§ 16.630]

1. *Writ of execution* is order to sheriff to satisfy judgment from property of debtor. [Wis. Stat.](#) § 815.05.
 - a. Writ executed by clerk and by owner of judgment.
 - b. Writ must set forth details of judgment and is returnable within 60 days. [Wis. Stat.](#) § 815.06.
 - c. If execution sought in county other than place of judgment, creditor should file transcript of judgment docket in county of execution; county of original judgment can issue writ. *Wilson v. Craite*, 60 Wis. 2d 350 (1973).
2. Execution on real estate commenced by filing writ with register of deeds. [Wis. Stat.](#) § 815.195.

- a. Sheriff must post and publish notice of sale. [Wis. Stat.](#) § 815.34.
- b. After notice, sheriff sells real estate at auction and certifies sale to purchaser and court. [Wis. Stat.](#) § 815.31.

NOTE: [Wis. Stat.](#) § 815.31(1)–(4) specify timing and manner of publication of sale notices.

- c. Debtor has one year to redeem for sale price plus interest. [Wis. Stat.](#) § 815.39; *Varco-Pruden v. Hansen*, 152 Wis. 2d 266 (Ct. App. 1989).
 - d. The time period for redemption for foreclosure of abandoned properties is five weeks. [Wis. Stat.](#) § 846.102.
 - (1) If the court finds that the premises have been abandoned, the plaintiff must hold a sale of the mortgaged premises no later than 12 months after the date when the judgment of foreclosure is entered and have the sale confirmed under [Wis. Stat.](#) § 846.16(2m). [Wis. Stat.](#) § 846.102(3)(a)1.
 - (2) The plaintiff may also release or satisfy the mortgage lien and vacate the judgment of foreclosure; upon the plaintiff presenting evidence that the mortgage lien was released and satisfied, the court must vacate the judgment of foreclosure with prejudice. [Wis. Stat.](#) § 846.102(3)(a)2.
 - (3) Any sale of the mortgaged premises may be held any time after the expiration of five weeks after the date when the judgment is entered. [Wis. Stat.](#) § 846.102(3)(a).
 - (4) Notice of the time and place of the sale must be given under [Wis. Stat.](#) § 846.16(1) and may be given any time within the 12-month period. [Wis. Stat.](#) § 846.102(3)(a).
 - (5) If the plaintiff does not hold and confirm a sale of the mortgaged premises within the 12-month period, any party to the action, or the city, town, village, or county where the mortgaged premises are located, may petition the court for an order compelling the sale of the mortgaged premises. [Wis. Stat.](#) § 846.102(3)(b).
 - e. If property is not redeemed, sheriff issues deed to sale purchaser. [Wis. Stat.](#) § 815.55.
 - f. If first creditor has acquired property through execution, another judgment creditor or mortgagee may acquire title by paying first creditor's execution purchase price, interest, and first creditor's prior judgment or mortgage. [Wis. Stat.](#) §§ 815.48, 815.53.
3. Personal property may be seized by sheriff and sold at auction after notice. [Wis. Stat.](#) § 815.29.

NOTE: Effective execution may take place without sheriff actually taking possession if the property is under sheriff's view and control at the time of levy and if sheriff informs the property holder that the property is considered seized and subject to execution. *Muggli Dental Studio v. Taylor*, 142 Wis. 2d 696 (Ct. App. 1987).

4. Sheriff may require indemnification bond and often requires bond for double value of property to be seized. [Wis. Stat.](#) § 815.24.

NOTE: The sheriff may require a bond only if, on some objective basis, there is reasonable doubt as to ownership of the property to be seized. *Ter Maat v. Barnett*, 156 Wis. 2d 737 (Ct. App. 1990).

5. Exemptions from execution and other creditor remedies
 - a. Personal property exemptions enumerated by statute. [Wis. Stat.](#) § 815.18.
 - (1) Each spouse is entitled to exemptions. *Tralmer Sales & Serv., Inc. v. Erickson*, 186 Wis. 2d 549 (Ct. App. 1994).
 - (2) If exemption is limited to maximum dollar amount, each spouse is entitled to one exemption, limited to maximum dollar amount, which may be combined with other spouse's exemption in same property or applied to different property. [Wis. Stat.](#) § 815.18(8).
 - (3) Income exemption cannot be combined with other spouse's exemption. *Id.*
 - b. Homestead exemption of \$75,000 equity. [Wis. Stat.](#) § 815.20.

Exemption applies to property held jointly by spouses or held as marital property, and each spouse may claim a homestead exemption of not more than \$75,000, but each can claim an exemption, for a total of \$150,000.

- (1) Homestead definition includes lands surrounding exempt homesteads, even if used for income generation, but additional lands must be reasonably necessary for use as a home. [Wis. Stat.](#) § 990.01(14); *In re Burgus*, 166 B.R. 126 (W.D. Wis. 1991); *In re Mann*, 82 B.R. 981 (Bankr. W.D. Wis. 1986); *Farm Credit Bank v. Gibson*, 155 Wis. 2d 325 (Ct. App. 1990); *see also In re Olsen*, 322 B.R. 400 (Bankr. E.D. Wis. 2005).

The homestead exemption is to be liberally construed in favor of the debtor, and homestead rights are preferred over the rights of creditors. In a bankruptcy in which a single lender has one mortgage that covers both homestead and nonhomestead property, Wisconsin gives the debtor the option to “insist” that the mortgage be satisfied from the nonhomestead property first so that the debtor may protect the maximum amount of equity in the property. *Hoffman v. Hartley (In re Hartley)*, 483 B.R. 700, 704–05 (Bankr. W.D. Wis. 2012).

- (2) Temporary removal with intention to reoccupy premises as homestead does not waive homestead exemption. [Wis. Stat.](#) § 815.20(1); *Moore v. Krueger*, 179 Wis. 2d 449 (Ct. App. 1993).
- (3) Wisconsin homestead exemption has been held to be preempted by federal Victim and Witness Protection Act, 18 [U.S.C.](#) §§ 3663–3664, which provides that convicted criminal defendants can be ordered to make restitution to victims. The homestead exemption is also preempted by tax code provisions that enable the federal government to enforce liens against delinquent taxpayers, *see infra* (5). *United States v. Lampien*, 89 F.3d 1316 (7th Cir. 1996).

NOTE: Marsy's Law, Wis. Const. art. I, § 9m, also mandates restitution.

- (4) Relevant time period for determining whether homestead property is partially or fully exempt is time of transfer by judgment debtor. If property is fully exempt, judgment does not create lien on judgment debtor's homestead. *Rumage v. Gullberg*, 2000 WI 53, 235 Wis. 2d 279, *amended on denial of reconsideration*, 2000 WI 112, 238 Wis. 2d 844 (holding that debtor's arm's-length sale price was appropriate means to determine value).
- (5) Qualifying homestead is exempt from all judgment liens—except for mortgages; laborers', mechanics', and purchase-money liens; and taxes. [Wis. Stat.](#) § 815.20; *CVW, Ltd. v. Stress*, 230 Wis. 2d 450 (Ct. App. 1999).

In *CVW*, initial judgment lien did not attach to fully exempt homestead property. Later federal tax lien, which was not subject to homestead exemptions, took priority.

- (6) Homestead exemption does not prevent execution sale of house if debtor purchased it with funds converted from plaintiff. *Estate of Paulman v. Pemberton*, 2001 WI App 164, 246 Wis. 2d 909.
- c. Retirement benefits. [Wis. Stat.](#) § 815.18(3)(j).
- (1) Assets held in retirement plan or similar contract providing benefits “by reason of age” are exempt.
 - (2) Single-premium deferred annuity contracts purchased by 58-year-old debtor were ruled exempt, even though distribution was tied to fixed one-year terms and not to debtor's age. *In re Bogue*, 240 B.R. 742 (Bankr. E.D. Wis. 1999). *But see In re Przybylski*, 340 B.R. 624 (Bankr. E.D. Wis. 2006).
 - (3) Flexible-premium retirement annuity purchased on eve of bankruptcy was exempt when it complied with Internal Revenue Code provisions for tax-deferred status. *In re Bruski*, 226 B.R. 422 (Bankr. W.D. Wis. 1998).
 - (4) Inherited individual retirement account (IRA) is not exempt under [Wis. Stat.](#) § 815.18(3)(j) because it is not held or payable “by reason of age.” *Clark v. Rameker (In re Clark)*, 573 U.S. 122 (2014); *In re Kirchen*, 344 B.R. 908 (Bankr. E.D. Wis. 2006).
- d. College savings accounts. *Cirilli v. Bronk (In re Bronk)*, 775 F.3d 871, 872 (7th Cir. 2015).

Owner of a college savings account may exempt owner's interest in account pursuant to [Wis. Stat.](#) § 815.18(3)(p).

F. Creditors' Actions [§ 16.631]

1. Insolvent debtor may voluntarily or involuntarily assign assets for benefit of creditors. [Wis. Stat.](#) § 128.02(1).
 - a. Creditor assignee must file assignment and bond with clerk of circuit court.

- b. Property of debtor shared ratably by creditors under supervision of court. [Wis. Stat. § 128.02\(3\)](#).
- c. Assignment made within 30 days after judgment lien can dissolve lien. [Wis. Stat. § 128.03](#).
2. Preferences are transfers made within four months before filing. [Wis. Stat. § 128.07](#).
3. Courts can sequester debtor's property and appoint liquidating receiver. [Wis. Stat. § 128.08](#).
 - a. Requires bond and filing of inventory. [Wis. Stat. § 128.09](#).
 - b. Receiver required to notify creditors and allow three months for claims and may enjoin proceeding by any other creditor against insolvent debtor. [Wis. Stat. § 128.14](#).
4. Objections to claims adjudicated by court. [Wis. Stat. § 128.15\(1\)](#).
5. Proceeding liquidates only unsecured property. [Wis. Stat. § 128.15\(2\)](#); *Wisconsin Brick & Block Corp. v. Vogel*, 54 Wis. 2d 321 (1972).

G. Nonsupplementary Receivers [§ 16.632]

1. Receiver appointed under [Wis. Stat. § 813.16](#) offers creditor some additional flexibility over receivers appointed under [Wis. Stat. § 816.08](#) (supplementary receivers) and [Wis. Stat. § 128.08](#) (creditor's action).
 - a. Does not require that judgment be obtained, as with supplementary receiver.
 - b. Does not require proof of insolvency, as with [Wis. Stat. § 128.08](#) receiver.
2. When receiver may be appointed
 - a. Party establishes apparent right to property in possession of another party, and property or profits are in danger of being lost. [Wis. Stat. § 813.16\(1\)](#).
 - b. To dispose of property pursuant to judgment. [Wis. Stat. § 813.16\(2\)](#).
 - c. To preserve property during pendency of an appeal. [Wis. Stat. § 813.16\(3\)](#).
 - d. Corporation has been dissolved, is insolvent, or has forfeited its corporate rights. [Wis. Stat. § 813.16\(4\)](#).
 - e. Grounds exist to invoke court's inherent, historic equitable powers. [Wis. Stat. § 813.16\(5\)](#); *American Med. Servs., Inc. v. Mutual Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198 (1971).
 - f. If savings and loan associations or banks are creditors seeking receiver, the court will appoint an officer of institution as receiver. [Wis. Stat. § 813.16\(7\)](#).
3. Receiver must post bond. [Wis. Stat. § 813.16\(6\)](#).

Chapter 17

Criminal Procedure

Craig W. Albee
Gabriela A. Leija
Milwaukee

NOTE: Attorney Stephen M. Glynn is the original author of this chapter and continued in that role until 2020.

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 252; all references to the Wisconsin Jury Instructions—Criminal are to the 2021 supplement; and all references to Wisconsin Supreme Court Rules (SCR) are to the rules as amended by supreme court orders through May 9, 2022.

I. INTRODUCTION [§ 17.633]

A. In General [§ 17.634]

1. Defense of criminal cases is a specialized area of law with grave consequences for the client; attorneys should not take on the responsibility unless sufficiently experienced or willing to associate with criminal defense lawyers.
2. Numerous helpful references are available:
 - a. [*Wisconsin Judicial Benchbook, Vol. 1—Criminal and Traffic*](#) (State Bar of Wis. 7th ed. 2022) [hereinafter [*Benchbook*](#)];
 - b. 9 Christine M. Wiseman & Michael Tobin, *Wisconsin Practice Series—Criminal Practice and Procedure* (2d ed.), Westlaw (database updated Aug. 2020);
 - c. Wisconsin Jury Instructions—Criminal, <https://wilawlibrary.gov/jury/criminal/> [hereinafter [*Wis. JI—Crim.*](#)];
 - d. Kathleen Pakes, [*Wisconsin Criminal Defense Manual*](#) (State Bar of Wis. 7th ed. 2020); and
 - e. Wisconsin State Public Defender’s website: <https://www.wisspd.org>.
3. All discussions except those relating to the preliminary examination, *see infra* §§ [17.12–.16](#), and the timing of motions, *see infra* §§ [17.10](#), [17.11](#), [17.22](#), [17.38](#), are fully applicable to misdemeanors as well as felonies.

B. Counsel’s Competence [§ 17.635]

1. Ethical considerations: Lawyers must not handle legal matters that they know or should know they are not competent to handle without associating with a lawyer who is competent in the matter. *See* [SCR](#) 20:1.1.

If limited-scope representation is provided, “competent” means having such competence as necessary for the limited-scope representation. [SCR](#) 20:1.1 cmt.; *see* [Wis. Stat.](#) § 802.045.

2. Wisconsin test: Effective representation is what the ordinarily prudent lawyer, skilled and versed in criminal law, would give clients who had privately retained his or her services. *State v. Pitsch*, 124 Wis. 2d 628 (1985).

II. INITIAL APPEARANCE [§ 17.636]

A. Right to Prompt Judicial Determination of Probable Cause [§ 17.637]

1. For persons arrested without a warrant, the magistrate’s probable-cause determination must take place within 48 hours after arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *State v. Koch*, 175 Wis. 2d 684 (1993).
2. Defendant need not be present when magistrate makes probable-cause determination. *State v. Evans*, 187 Wis. 2d 66, 86 (Ct. App. 1994).

B. Court’s Function at Initial Appearance [§ 17.638]

See generally [Wis. Stat.](#) § 970.02.

1. Inform defendant of charges and provide defendant with complaint.
2. Determine counsel status.
3. Admit defendant to bail. [Wis. Stat.](#) ch. 969.
4. Arraign defendant in misdemeanor cases.
5. Set date for next proceeding.
 - a. Misdemeanor: Trial date, if defendant requests, within 60 days after initial appearance. [Wis. Stat.](#) §§ 970.02(3), 971.10(1).
 - b. Felony: Preliminary examination required under [Wis. Stat.](#) § 970.03(2) within 10 days after initial appearance if defendant is in custody or within 20 days if not; time may be extended by stipulation or by motion upon cause shown. [Wis. Stat.](#) §§ 970.02(5), 970.03(2). The court loses personal jurisdiction over the defendant if the hearing is held beyond the 10-day limit without a proper finding of good cause. *State v. Lee*, 2021 WI App 12, 396 Wis. 2d 136 (review dismissed).
6. Determine whether complaint states probable cause. [Benchbook](#), *supra* § 17.2, ch. CR 7.
7. Determine need for DNA specimen. [Wis. Stat.](#) § 970.02(8).

C. Defense Motions and Demands [§ 17.639]

1. Determine defendant's competency to proceed; at other stages, raise if reason to doubt defendant's competency. [Wis. Stat.](#) §§ 971.13–.14.
 - a. Burden is on the state to disprove defendant's assertion of competence or incompetence; burden and standard are constitutional. [Wis. Stat.](#) § 971.14(4)(b); *State v. Wanta*, 224 Wis. 2d 679 (Ct. App. 1999).
 - b. Failure to raise issue of defendant's competency when counsel has reason to doubt defendant's competency constitutes ineffective assistance of counsel. *State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794; *State v. Johnson*, 133 Wis. 2d 207 (1986).
 - c. Attorney's opinions, perceptions, and impressions relating to former client's mental competency are inextricably linked with confidential communications and cannot be revealed without client's consent. *State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794.
2. Challenge orally, or orally reserve the right to challenge later in writing, court's jurisdiction over person of defendant on such grounds as sufficiency of complaint or untimeliness of probable-cause finding. *State v. Koch*, 175 Wis. 2d 684 (1993); *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 438–40 (1970).
3. Secure client's release on reasonable bail; factors set forth in [Wis. Stat.](#) ch. 969. [Wis. Stat.](#) § 969.01(4).
4. Request preliminary examination if client charged with felony, *see infra* §§ [17.12–.16](#). [Wis. Stat.](#) § 970.02(4), (5).
 - a. General rule is never waive hearing because of discovery opportunity it presents, but admissibility of hearsay has diminished the value of the preliminary examination to defense. *See* [Wis. Stat.](#) § 970.038.
 - b. Exceptions (when preliminary examination should be waived):
 - (1) To avoid preservation of testimony;
 - (2) To avoid opportunity for prosecution witnesses to undergo cross-examination before trial; and
 - (3) To receive discovery beyond that authorized by statute, either in volume or timing, or other favors from prosecutor.

III. MOTIONS AFTER INITIAL APPEARANCE [§ 17.640]**A. Motions Defined [§ 17.641]**

See generally [Wis. Stat.](#) § 971.30.

1. References throughout chapter to *motions* contemplate written motions stating with particularity the grounds and the order or relief sought.
2. If time is insufficient for written motion, make motion orally on record.

B. Motions in Misdemeanor Cases [§ 17.642]

See generally [Wis. Stat.](#) § 971.31(5)(a).

1. All motions must be filed within 10 days after initial appearance.
2. See *infra* §§ [17.18](#), [17.21–47](#).

C. Motions in Felony Cases Before Preliminary Examination [§ 17.643]

1. Motion seeking modification of bail should be brought if client still incarcerated. [Wis. Stat.](#) § 969.08.
2. Motion challenging sufficiency of complaint must be brought before preliminary examination or will be deemed waived, [Wis. Stat.](#) § 971.31(5)(c); grounds for motion are that complaint
 - a. Fails to relate essential facts, [Wis. Stat.](#) §§ 968.01(2), 970.02(1)(a); *State v. Haugen*, 52 Wis. 2d 791 (1971); *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 230 (1968); or
 - b. Charges an overbroad or ambiguous time frame, *State v. Schultz*, 2020 WI 24, ¶ 53, 390 Wis. 2d 570, *cert. denied*, 141 S. Ct. 344 (2020); or
 - c. Contains unreliable information, [Wis. Stat.](#) § 968.01; *Illinois v. Gates*, 462 U.S. 213 (1983); or
 - d. Contains misstatements or omissions from factual portion; motion *must* be supported by affidavit or other reliable statement based on personal knowledge, preferably by defendant personally as opposed to affidavit of counsel, *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978); *State v. Mann*, 123 Wis. 2d 375, 388–89 (1985).
3. Motion challenging personal jurisdiction may be brought on grounds such as failure to begin preliminary examination within statutory time limits. [Wis. Stat.](#) § 970.03(2); *Logan v. State*, 43 Wis. 2d 128, 138 (1969).
4. Motion seeking production of exculpatory evidence before preliminary examination may be brought. *State ex rel. Lynch v. County Ct.*, 82 Wis. 2d 454, 467–68 (1978).
5. Motion seeking substitution of judge assigned to preliminary examination must be in writing; substitution of judge in preliminary examination exhausts right to substitution for duration of action, except after appeal. [Wis. Stat.](#) § 971.20(3)(b), (7).

IV. PRELIMINARY EXAMINATION IF CHARGE IS FELONY [§ 17.644]

See generally [Benchbook](#), *supra* § [17.2](#), ch. CR 9.

A. Purpose [§ 17.645]

See generally [Wis. Stat.](#) § 970.03.

1. To determine whether the state has made a plausible showing of probable cause to bind over for trial. *State v. O'Brien*, 2014 WI 54, ¶ 24, 354 Wis. 2d 753; *State v. Dunn*, 121 Wis. 2d 389, 394–95 (1984).

Preliminary examination's underlying purpose is to protect accused from hasty, improvident, or malicious prosecution. *State v. Kleser*, 2010 WI 88, ¶ 55, 328 Wis. 2d 42.

2. Right to preliminary examination is statutory, not constitutional. *O'Brien*, 2014 WI 54, ¶ 46, 354 Wis. 2d 753; *State v. Williams*, 198 Wis. 2d 516 (1996).
3. Probable-cause level at preliminary examination is greater than that required for issuing arrest warrant. *State v. Kittilstad*, 222 Wis. 2d 204 (Ct. App. 1998), *aff'd*, 231 Wis. 2d 245 (1999); see *State v. Berby*, 81 Wis. 2d 677, 683 (1978).
4. Preliminary examination is technically not for discovery; however, discovery is greatest utility of preliminary examination for defense, although substantially weakened by admissibility of hearsay. [Wis. Stat.](#) § 970.038(1); *State v. Knudson*, 51 Wis. 2d 270, 281 (1971); see also *O'Brien*, 2014 WI 54, ¶ 37, 354 Wis. 2d 753.
5. Corporations have no constitutional or statutory right to preliminary examination. [Wis. Stat.](#) § 971.02; *State v. C&S Mgmt., Inc.*, 198 Wis. 2d 844 (Ct. App. 1995).

B. Conduct of Preliminary Examination [§ 17.646]

1. Evidentiary proceeding; therefore, defendant's presence is required. [Wis. Stat.](#) § 971.04(1)(d). A defendant may waive that right and appear by telephone or live audiovisual means if both parties consent and the court permits. See [Wis. Stat.](#) § 967.08.
2. Presumptively public, although may be closed under limited circumstances. [Wis. Stat.](#) § 970.03(4); *State ex rel. Stevens v. Circuit Ct.*, 141 Wis. 2d 239 (1987).
3. Witnesses sworn and transcript made. [Wis. Stat.](#) § 970.03(5).
4. Rules of evidence apply, with major exception being admissibility of hearsay. [Wis. Stat.](#) §§ 911.01, 970.038(1); *Mitchell v. State*, 84 Wis. 2d 325, 330 (1978).
 - a. Hearsay is admissible, and the state's reliance on hearsay at the preliminary examination has been deemed constitutional. [Wis. Stat.](#) § 970.038(1); *State v. O'Brien*, 2014 WI 54, ¶¶ 20, 61, 354 Wis. 2d 753.
 - b. State Crime Laboratory and certain other laboratory reports are, accordingly, admissible even though hearsay. [Wis. Stat.](#) §§ 970.03(12), 970.038(1).
 - c. For potential challenges to the use of hearsay at preliminary examinations, see Marla Stephens, *Challenging Hearsay at Preliminary Examinations* (Jan. 2013), <https://www.wisprd.org/images/AppellateFolder/templatesforms/ChHearsayPreEx.pdf>.

- d. Circuit court still has duty to consider the reliability of the state's evidence at the preliminary examination in determining whether plausible showing of probable cause. *O'Brien*, 2014 WI 54, ¶ 60, 354 Wis. 2d 753.

C. Defendant's Rights at Preliminary Examination [§ 17.647]

1. Sequestration and exclusion of witnesses. [Wis. Stat.](#) §§ 906.15, 970.03(6).
2. Cross-examination of state witnesses and presentation of defense witnesses. [Wis. Stat.](#) § 970.03(5).

Scope of testimony is limited to issues of plausibility. *State v. O'Brien*, 2014 WI 54, ¶¶ 24, 50, 354 Wis. 2d 753.

3. Examination to lay basis for future suppression motions, especially regarding defendant's identification. *Hayes v. State*, 46 Wis. 2d 93, 99 (1970), *overruled on other grounds by State v. Taylor*, 60 Wis. 2d 506 (1973).
4. Defendant does not have statutory or constitutional right to subpoena police reports for discovery purposes before the preliminary hearing. *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279.

D. Dismissal at Preliminary Examination [§ 17.648]

See generally Wittke v. State ex rel. Smith, 80 Wis. 2d 332, 348 (1977). *But see State v. Brown*, 96 Wis. 2d 258, 270 (1980).

1. Court must dismiss action if there is no probable cause as to any crime. [Wis. Stat.](#) § 970.03(9).
2. State need only establish probable cause that felony occurred as to one count in set of transactionally related counts for there to be bindover on that set; need not establish probable cause that specific felony alleged in each count was committed. [Wis. Stat.](#) § 970.03(10); *State v. Williams*, 198 Wis. 2d 479 (1996).
3. Court must reduce charge if showing only of probable cause for misdemeanor. [Wis. Stat.](#) § 970.03(8).
4. State may reissue dismissed charge in new complaint, based on new or unused evidence, subject to fair-play doctrine. [Wis. Stat.](#) § 970.04; *State v. Brown*, 96 Wis. 2d 258, 266–67 (1980); *State v. Johnson*, 231 Wis. 2d 58, 67–70 (Ct. App. 1999).

V. ARRAIGNMENT [§ 17.649]

A. Prearraignment Motions [§ 17.650]

1. Prearraignment motions must raise certain issues to preserve them, including the following:

- a. Lack of personal jurisdiction (even if raised earlier, should be raised also in a prearraignment motion to preserve issue for review), *Armstrong v. State*, 55 Wis. 2d 282, 285–86 (1972); *State v. Asmus*, 2010 WI App 48, ¶ 4, 324 Wis. 2d 427;
- b. Untimely preliminary examination, *Logan v. State*, 43 Wis. 2d 128, 139 (1969);
- c. Insufficiency of evidence at preliminary examination, *State v. Kittilstad*, 222 Wis. 2d 204 (Ct. App. 1998), *aff'd*, 231 Wis. 2d 245 (1999); *see also State ex rel. Dowe v. Circuit Ct.*, 184 Wis. 2d 724 (1994);

NOTE: The defendant may ordinarily not obtain relief for errors at the preliminary examination after trial—appellate relief for a defective preliminary examination conducted by a judge may only be obtained through a permissive interlocutory appeal before trial. However, if the petition for leave to appeal is denied, error is preserved. *State v. Webb*, 160 Wis. 2d 622 (1991); *see also Dowe*, 184 Wis. 2d 724; *State v. DeRango*, 229 Wis. 2d 1, 9 (Ct. App. 1999), *aff'd on other grounds*, 2000 WI 89, ¶ 12 n.2, 236 Wis. 2d 721.

- d. Untimely filing of information, [Wis. Stat.](#) § 971.01(2); *State v. Phillips*, 2000 WI App 184, 238 Wis. 2d 279;
- e. Insufficiency of information (unless subject-matter jurisdiction), *State v. Russo*, 70 Wis. 2d 169, 173–74 (1975);

NOTE: If the error truly affects subject-matter jurisdiction, it may be possible to raise the issue later; however, this approach is risky and ill advised. *State v. Powers*, 2004 WI App 156, 276 Wis. 2d 107.

- f. Felony counts alleged in information *wholly unrelated* to facts elicited at preliminary examination, *State v. Richer*, 174 Wis. 2d 231 (1993); *State v. Koch*, 175 Wis. 2d 684 (1993);
- g. Insufficiency of complaint (even if raised earlier, should be raised in prearraignment motion to preserve issue for review), *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432 (1970); and
- h. Substitution of judge originally assigned to trial (if no earlier substitution made), [Wis. Stat.](#) § 971.20(4); *State v. Harrison*, 2015 WI 5, 360 Wis. 2d 246; *State v. Norwood*, 2005 WI App 218, ¶¶ 10–12, 287 Wis. 2d 679; *see also supra* § [17.11](#).

NOTE: The denial of a substitution request should be challenged by a petition for leave to appeal; a guilty or no-contest plea may waive the issue. *State v. Damaske*, 212 Wis. 2d 169 (Ct. App. 1997); *see Wis. Stat.* §§ 808.03(2), 809.50.

2. Timing of prearraignment motions

If there is insufficient time to prepare motions before arraignment (e.g., same-day arraignment), reserve right to bring motions later.

B. Conduct of Arraignment [§ 17.651]

1. Defendant has a right to appear personally but may waive that right and appear by telephone or live audiovisual means if both parties consent and the court permits. *See* [Wis. Stat.](#) §§ 971.04(1)(a), 967.08.
2. Must be in open court—namely, in trial court, preliminary examination court (for felonies), or initial appearance court (for misdemeanors). [Wis. Stat.](#) § 971.05(intro.), (1).
3. Defendant is entitled to receive copy of information in felony case and entitled to have it read in all cases unless defendant waives reading. [Wis. Stat.](#) § 971.05(3).
4. Under [Wis. Stat.](#) § 971.06, defendant pleads
 - a. Guilty, *or*
 - b. Not guilty (silence treated as not guilty), *or*
 - c. No contest (subject to approval of court), *or*
 - d. Not guilty by reason of mental disease or defect (may be joined with any one of other pleas). *See* [Wis. Stat.](#) § 971.15; [Wis. JI](#)—Crim. 600–605B.

C. Defendant's Rights at Arraignment [§ 17.652]

1. Motion for change of venue. [Wis. Stat.](#) § 971.22.
 - a. Must be made at arraignment unless cause exists for later motion. [Wis. Stat.](#) § 971.22(1).
 - b. Must be in writing and supported by evidentiary affidavit. [Wis. Stat.](#) § 971.22(2).
 - c. Factors to be considered discussed in case law. *Tucker v. State*, 56 Wis. 2d 728, 735–36 (1973); *State v. Ritchie*, 2000 WI App 136, ¶ 23, 237 Wis. 2d 664.
 - d. Court may select jury in another county and then return to original county for trial. [Wis. Stat.](#) § 971.225.
2. Procedure established for plea of mental disease or defect. [Wis. Stat.](#) § 971.165.
3. Speedy trial. [Wis. Stat.](#) § 971.10(2)(a), (4).
 - a. Misdemeanor: Trial within 60 days after initial appearance. [Wis. Stat.](#) § 971.10(1).
 - b. Felony: Trial within 90 days after written demand. [Wis. Stat.](#) § 971.10(2)(a).
 - c. Remedy is discharge from custody if in custody; any other conditions of bond or release remain in effect. [Wis. Stat.](#) § 971.10(4).
4. Consolidated pleas to offenses in several counties. [Wis. Stat.](#) § 971.09.

VI. PRETRIAL MOTIONS TO DISMISS [§ 17.653]

A. When Motions Must Be Brought [§ 17.654]

See generally [Wis. Stat. § 971.31\(5\)](#).

1. Misdemeanor: Within 10 days after initial appearance unless court otherwise permits. [Wis. Stat. § 971.31\(5\)\(a\)](#); *State v. Christensen*, 110 Wis. 2d 538, 542 (1983). See generally *State v. Smith*, 2005 WI 104, ¶¶ 17–20, 283 Wis. 2d 57.
2. Felony: Within 10 days after arraignment unless court otherwise permits.

B. Lack of Subject-Matter Jurisdiction [§ 17.655]

1. Failure to state material elements or failure to charge offense; but absent showing of actual prejudice, information that fails to set forth all elements of charge is nonetheless sufficient if pleading includes correct citation to applicable criminal statute. *State v. Petrone*, 161 Wis. 2d 530, 557–58 (1991), *overruled on other grounds by State v. Greve*, 2004 WI 69, ¶ 31 n.7, 272 Wis. 2d 444; see, e.g., *State v. Bush*, 2005 WI 103, 283 Wis. 2d 90.
2. Failure to allege offense with sufficient detail to allow accused to prepare defense. *State v. Hurley*, 2015 WI 35, 361 Wis. 2d 529; *State v. Kempainen*, 2015 WI 32, 361 Wis. 2d 450; *State v. Becker*, 2009 WI App 59, ¶ 10, 318 Wis. 2d 97; *State v. Stark*, 162 Wis. 2d 537, 544–45 (Ct. App. 1991).

COMMENT: For an illustration of how an ambiguous time frame may unfairly prejudice the defendant, see *State v. Schultz*, 2020 WI 24, 390 Wis. 2d 570, *cert. denied*, 141 S. Ct. 344 (2020).

3. Multiplicity: Charging single offense in more than one count. *State v. Ziegler*, 2012 WI 73, ¶ 59, 342 Wis. 2d 256; *State v. Davison*, 2003 WI 89, ¶ 34, 263 Wis. 2d 145; *State v. Church*, 223 Wis. 2d 641 (Ct. App. 1998).
4. Duplicity: Charging more than one offense in single count. *State v. Lopez*, 2019 WI App 2, 385 Wis. 2d 482 (holding that it was not duplicitous for the state to charge multiple acts of retail theft as one continuing offense), *aff'd*, 2019 WI 101, 389 Wis. 2d 156; *State v. Miller*, 2002 WI App 197, ¶ 22, 257 Wis. 2d 124 (holding that it was not duplicitous to charge one continuous offense of sexual exploitation by a therapist based on multiple acts occurring over multiple years).
5. Failure to negate existence of statutory exception to crime, provided exception is element. *State v. Olson*, 106 Wis. 2d 572, 580–81 (1982). *But see Petrone*, 161 Wis. 2d 530.
6. Unconstitutionality of charged statute under Wisconsin or federal constitutions
 - a. Circuit court has authority to decide constitutional questions. *Just v. Marinette Cnty.*, 56 Wis. 2d 7 (1972).
 - b. Wisconsin is free to apply higher constitutional standard than federal courts. *State v. Hansford*, 219 Wis. 2d 226, 242–43 (1998).

- c. Parallel Wisconsin provisions exist for many federal constitutional rights. *See, e.g.*, Wis. Const. art. I, § 3 (1st Amendment), art. I, § 11 (4th Amendment), art. I, § 8(2) (8th Amendment right to reasonable bail).
- d. Constitutional challenges to a charged statute may be based on such matters as vagueness or equal protection; the defendant must notify attorney general that the defense is challenging the statute's constitutionality. [Wis. Stat.](#) § 806.04(11). As a result of legislative amendments to [Wis. Stat.](#) § 806.04(11) in 2018, the defendant must also notify the speaker of the assembly, the president of the senate, and the senate majority leader if a statute's constitutionality is challenged. For examples of constitutional challenges, see, e.g., *State v. Neumann*, 2013 WI 58, 348 Wis. 2d 455; *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433; *State v. Zarnke*, 224 Wis. 2d 116 (1999).

NOTE: A challenge to the constitutionality of a charged statute may be the basis for a permissive appeal. *State v. Webb*, 160 Wis. 2d 622, 633 n.8 (1991); see [Wis. Stat.](#) §§ 808.03(2), 809.50.

- 7. Beyond court's authority (e.g., juvenile in adult court). *H.N.T. v. State (In re H.N.T.)*, 125 Wis. 2d 242 (Ct. App. 1985).
 - a. The defendant's age at the time charges are issued, not at the time the defendant allegedly committed the underlying conduct, determines whether the circuit court has competency to hear the case as a criminal, juvenile delinquency, or juvenile in need of protection or services (JIPS) matter. *State v. Sanders*, 2018 WI 51, 381 Wis. 2d 522. *But see State v. Becker*, 74 Wis. 2d 675, 677 (1976) (holding that state violates defendant's right to due process when it delays charging as part of "deliberate effort to avoid juvenile court jurisdiction"; defendant who moves to dismiss on this ground and raises genuine issues of fact is entitled to hearing at which state must prove delay was not to manipulate the system).
 - b. If a juvenile has been previously waived into adult court, then the adult court has "exclusive original jurisdiction" over a current charge if that previous waiver resulted in a conviction or remains pending ("once waived, always waived"). *State v. Hinkle*, 2019 WI 96, ¶¶ 29–30, 389 Wis. 2d 1 (citing [Wis. Stat.](#) § 938.183(1)(b)).

C. Double Jeopardy [§ 17.656]

See generally [Wis. Stat.](#) § 939.71; *State v. Sepulveda*, 119 Wis. 2d 546 (1984).

- 1. Types of double jeopardy:
 - a. Retrial after mistrial. *State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383.
 - b. Retrial after conviction or acquittal. *State v. Schultz*, 2020 WI 24, 390 Wis. 2d 570, *cert. denied*, 141 S. Ct. 344 (2020); *State v. Henning*, 2004 WI 89, 273 Wis. 2d 352; *State v. Kurzawa*, 180 Wis. 2d 502 (1994).
 - c. Retrial after conviction or acquittal in another jurisdiction.
 - (1) No constitutional prohibition against successive prosecutions by separate sovereigns. *Gamble v. United States*, 139 S. Ct. 1960 (2019).

(2) Wisconsin statutorily bars successive prosecutions for the same offense, however. [Wis. Stat.](#) §§ 939.71, 961.45 (drug cases); *State v. Hansen*, 2001 WI 53, 243 Wis. 2d 328; *State v. Bautista*, 2009 WI App 100, 320 Wis. 2d 582; *State v. Lasky*, 2002 WI App 126, 254 Wis. 2d 789.

d. Multiple punishments for the same offense. *State v. Ziegler*, 2012 WI 73, ¶ 59, 342 Wis. 2d 256; *State v. Lechner*, 217 Wis. 2d 392, 401 (1998).

2. Interlocutory appeal available for reviewing denial of motion to dismiss based on double jeopardy. *State v. Jenich*, 94 Wis. 2d 74 (1980); see [Wis. Stat.](#) §§ 808.03(2), 809.50.

D. Selective or Discriminatory Prosecution [§ 17.657]

See generally *State v. Kramer*, 2001 WI 132, 248 Wis. 2d 1009; *Sears v. State*, 94 Wis. 2d 128, 134–35 (1980).

E. Vindictive or Retaliatory Prosecution [§ 17.658]

See generally *State v. Cameron*, 2012 WI App 93, 344 Wis. 2d 101; *State v. Minniecheske*, 118 Wis. 2d 357, 360 (Ct. App. 1984).

F. Lack of Speedy Trial [§ 17.659]

See generally *Vermont v. Brillon*, 556 U.S. 81 (2009).

G. Undue Precharging Delay [§ 17.660]

See generally *State v. Blanck*, 2001 WI App 288, 249 Wis. 2d 364; *State v. Strassburg*, 120 Wis. 2d 30 (Ct. App. 1984).

1. Delay in bringing indictment or petition against defendant may violate due process.

2. Defendant must show prejudice to self and tactical advantage to prosecution or harassment.

H. Collateral Estoppel or Issue Preclusion [§ 17.661]

See generally *State v. Canon*, 2001 WI 11, 241 Wis. 2d 164; *State v. Kramsvogel*, 124 Wis. 2d 101 (1985); *H.N.T. v. State (In re H.N.T.)*, 125 Wis. 2d 242 (Ct. App. 1985).

I. Statute of Limitation [§ 17.662]

See generally [Wis. Stat.](#) § 939.74; *State v. McGuire*, 2010 WI 91, 328 Wis. 2d 289; *State v. Jennings*, 2003 WI 10, 259 Wis. 2d 523.

J. Immunity [§ 17.663]

See generally [Wis. Stat.](#) § 972.085.

NOTE: In most situations, statutory immunity now bars only the *use and derivative use* of immunized statements and does not mandate dismissal, as the former *transactional immunity* statutes did.

K. Improper Venue [§ 17.664]

See generally [Wis. Stat.](#) § 971.19; *State v. Anderson*, 2005 WI 54, 280 Wis. 2d 104.

L. Outrageous Governmental Conduct [§ 17.665]

See generally *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986); *State v. Hyndman*, 170 Wis. 2d 198 (Ct. App. 1992).

M. Territorial Jurisdiction [§ 17.666]

See generally [Wis. Stat.](#) § 939.03; *State v. Anderson*, 2005 WI 54, 280 Wis. 2d 104.

N. Violation of Intrastate Detainer Law [§ 17.667]

See generally [Wis. Stat.](#) § 971.11; *State v. Davis*, 2001 WI 136, 248 Wis. 2d 986; *State v. Adams*, 207 Wis. 2d 568 (Ct. App. 1996).

O. Violation of Interstate Agreement on Detainers [§ 17.668]

See generally [Wis. Stat.](#) § 976.05; *State v. Onheiber*, 2009 WI App 180, 322 Wis. 2d 708.

VII. OTHER PRETRIAL MOTIONS AND DEMANDS [§ 17.669]

A. When Motions Must Be Brought [§ 17.670]

See generally [Wis. Stat.](#) § 971.31(5).

1. Misdemeanor: Within 10 days after initial appearance unless court otherwise permits.
2. Felony: Within 10 days after arraignment unless court otherwise permits.

B. Statutory Discovery and Disclosure [§ 17.671]

See generally [Benchbook](#), *supra* § 17.2, ch. CR 10.

1. Defendant's statements. [Wis. Stat.](#) § 971.23(1); *State v. DeLao*, 2002 WI 49, 252 Wis. 2d 289; *State v. Ruiz*, 118 Wis. 2d 177, 196–97 (1984).
 - a. Written and oral statements must be produced by state upon demand before trial. [Wis. Stat.](#) § 971.23(1)(a), (b).
 - b. If state plans to use statements at trial, names of witnesses to statements must be disclosed. [Wis. Stat.](#) § 971.23(1)(a), (b).

- c. Disclosure not limited to statements made to law enforcement officers. *Kutchera v. State*, 69 Wis. 2d 534, 545 (1975).
2. Prior criminal records

Defendant's record must be produced by state on demand before trial. [Wis. Stat. § 971.23\(1\)\(c\)](#).
3. List of witnesses and their addresses. [Wis. Stat. § 971.23\(1\)\(d\)](#).
 - a. If prosecutor lists numerous witnesses, ask court to require prosecutor to specify those actually intended to be called. *Irby v. State*, 60 Wis. 2d 311, 319 (1973).
 - b. Rebuttal witnesses need not be listed. [Wis. Stat. § 971.23\(1\)\(d\)](#); *Caccitolo v. State*, 69 Wis. 2d 102, 116 (1975); *State v. Wille*, 2007 WI App 27, 299 Wis. 2d 531; *State v. Konkol*, 2002 WI App 174, 256 Wis. 2d 725.
 - c. If party wants to exclude witness from list, protective order must be obtained. [Wis. Stat. § 971.23\(6\)](#).
 - d. As new witnesses are discovered, parties have continuing duty to disclose. [Wis. Stat. § 971.23\(7\)](#).
4. Inspection of physical evidence. [Wis. Stat. § 971.23\(1\)\(g\)](#).

Failure to produce physical evidence leads to exclusion; inadequate trial preparation does not justify nonproduction. [Wis. Stat. § 971.23\(7m\)](#); *Wold v. State*, 57 Wis. 2d 344 (1973).
5. Scientific testing
 - a. Sought by motion. [Wis. Stat. § 971.23\(5\)](#).
 - b. Defendant entitled, on demand, to all statements or reports, not merely results, of scientific tests. [Wis. Stat. § 971.23\(1\)\(e\)](#).
 - c. Specific procedure for DNA evidence. [Wis. Stat. § 971.23\(9\)](#).
 - d. Upon request by defendant and with approval by the court, defendant may have State Crime Laboratory analyze evidence on his or her behalf. [Wis. Stat. § 165.79](#).
6. Notice of alibi. [Wis. Stat. § 971.23\(8\)](#).
 - a. Alibi evidence inadmissible in absence of notice, unless court permits for cause. [Wis. Stat. § 971.23\(8\)\(b\)](#).
 - b. Statute should be followed even though it may be unconstitutional as applied. *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982).
7. Statements of witnesses—upon demand, production is required within a reasonable time before trial. [Wis. Stat. § 971.23\(1\)\(e\)](#).

8. Criminal records of prosecution witnesses. [Wis. Stat.](#) § 971.23(1)(f).
9. Results of police interception of oral or wire communications based on consent of one party to the communication. [Wis. Stat.](#) § 971.23(1)(bm).
10. Expert statements or reports concerning case, or written summary of expert's findings or proposed testimony. [Wis. Stat.](#) § 971.23(1)(e); *State v. Schroeder*, 2000 WI App 128, 237 Wis. 2d 575.
11. With the exception of defendant's statements, reciprocal discovery allowed for state. [Wis. Stat.](#) § 971.23(2m); *State v. Revels*, 221 Wis. 2d 315 (Ct. App. 1998).

Trial court has authority under [Wis. Stat.](#) § 906.11 to require either side to produce evidence in order to remove obstacles to smoothly run trial. *State v. McClaren*, 2009 WI 69, 318 Wis. 2d 739.

C. Disclosure of Exculpatory Evidence [§ 17.672]

See generally [Wis. Stat.](#) § 971.23(1)(h); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344; *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80.

1. Sought by demand; should be as particularized as possible.
 - a. Prosecution must disclose material specifically requested. *United States v. Agurs*, 427 U.S. 97 (1976).
 - b. General demand is little better than no demand. *Ruiz v. State*, 75 Wis. 2d 230, 240 (1977).
2. Includes evidence affecting credibility of witness when witness's credibility is material to guilt or innocence. *Banks v. Dretke*, 540 U.S. 668 (2004); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80.
3. Demand extends to prosecution agencies and instrumentalities such as police departments. *Kyles v. Whitley*, 514 U.S. 419, 438–39 (1995); *United States ex rel. Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985); *State v. DeLao*, 2002 WI 49, 252 Wis. 2d 289; *State v. White*, 2004 WI App 78, 271 Wis. 2d 742.
4. *Brady*, 373 U.S. 83, requires the prosecution to make exculpatory evidence available to the defense in time to reasonably make use of it at trial, while [Wis. Stat.](#) § 971.23, the discovery statute, requires the production of exculpatory evidence within a reasonable time *before trial* if it is within the possession, custody, or control of the state. [Wis. Stat.](#) § 971.23(1)(h); *State v. Harris*, 2008 WI 15, 307 Wis. 2d 555; *State v. Garrity*, 161 Wis. 2d 842, 850 (Ct. App. 1991).
5. Information otherwise confidential may be appropriate for in camera review by court (e.g., complainant's past mental-health treatment records, employment records). *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356; *State v. Lynch*, 2015 WI App 2, 359 Wis. 2d 482, *aff'd without majority opinion*, 2016 WI 66, 371 Wis. 2d 1; *State v. Navarro*, 2001 WI App 225, 248 Wis. 2d 396.

Under Marsy's Law (Wis. Const. art. I, § 9m(2)), the alleged victim has standing to oppose a defendant's motion under *Green*, 2002 WI 68, 253 Wis. 2d 356, for in camera review of the victim's health-care records. *State v. Johnson*, 2020 WI App 73, ¶¶ 1, 40, 394 Wis. 2d 807 (review granted).

6. State has privilege to protect identity of confidential informant, but privilege must give way if defendant shows that informant's testimony is necessary to defense. [Wis. Stat.](#) § 905.10; *State v. Vanmanivong*, 2003 WI 41, 261 Wis. 2d 202; *see also infra* § [17.43](#).
7. Court retains constitutional authority, under limited circumstances, to order psychiatric evaluation or interview of alleged victim by defense expert as condition of allowing that witness to testify, despite [Wis. Stat.](#) § 971.23(5c). *See State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407; *State v. Mainiero*, 189 Wis. 2d 80 (Ct. App. 1994); *State v. Maday*, 179 Wis. 2d 346 (Ct. App. 1993), *limited by State v. David J.K.*, 190 Wis. 2d 726 (Ct. App. 1994).
8. Plea with knowledge of state's incomplete disclosure of exculpatory evidence waives any right to postconviction discovery. *State v. Ziehli*, No. 2016AP1161-CR, 2017 WL 3209410 (Wis. Ct. App. July 27, 2017) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

D. Suppression of Evidence [§ 17.673]

1. Statements
 - a. Statements should be challenged on voluntariness as well as *Miranda* and right-to-counsel grounds, as appropriate; challenge on one does not incorporate challenge on other. [Wis. Stat.](#) § 971.31(3); *State v. Monje*, 109 Wis. 2d 138, 149 (1982).
 - b. Guilty plea does not necessarily waive Fifth Amendment rights. *State v. Peebles*, 2010 WI App 156, 330 Wis. 2d 243.
 - c. Procedures described in other sources. *See, e.g., Benchbook, supra* § [17.2](#), ch. CR 21.
2. Physical evidence. *See Benchbook, supra* § [17.2](#), ch. CR 19.
3. Identification. *See Benchbook, supra* § [17.2](#), ch. CR 20.

For evidentiary hearing to be required, defendant must allege a factual scenario or legal theory sufficient to establish reasonable probability of prevailing on motion to suppress. *State v. Garner*, 207 Wis. 2d 520 (Ct. App. 1996).

4. Wiretap evidence. *See Wis. Stat.* § 968.30(9)(a).
5. Other evidence derived from illegal or unconstitutional governmental actions, including warrantless searches. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670.

E. Severance of Crimes or Defendants [§ 17.674]

See generally Wis. Stat. § 971.12; *State v. Salinas*, 2016 WI 44, 369 Wis. 2d 9; *Benchbook, supra*

§ [17.2](#), ch. CR 18.

F. Disclosure of Confidential Informant [§ 17.675]

See generally [Wis. Stat.](#) § 905.10; *State v. Nellessen*, 2014 WI 84, 360 Wis. 2d 493.

G. Use of Sexual Conduct Evidence [§ 17.676]

See generally [Wis. Stat.](#) §§ 971.31(11), (12), 972.11(2); *State v. Sarfraz*, 2014 WI 78, 356 Wis. 2d 460, *denial of habeas relief aff'd sub nom. Sarfraz v. Smith*, 885 F.3d 1029 (7th Cir. 2018); *State v. Pulizzano*, 155 Wis. 2d 633 (1990).

Admission of *rape shield* evidence may be achieved *only* by pretrial motion.

H. Substitution of Trial Judge [§ 17.677]

If a new judge is assigned to the trial and defendant has not exercised substitution right, defendant may request substitution of new judge. [Wis. Stat.](#) § 971.20(5); *cf.* 971.20(4); *State v. Harrison*, 2015 WI 5, 360 Wis. 2d 246; *State v. Conger*, 2010 WI 56, 325 Wis. 2d 664; *State v. Tappa*, 2002 WI App 303, 259 Wis. 2d 402.

NOTE: The denial of a substitution request should be challenged by a permissive appeal; a guilty or no-contest plea waives the issue. *State v. Damaske*, 212 Wis. 2d 169 (Ct. App. 1997).

I. Motions in Limine [§ 17.678]

1. These motions, brought to obtain advance rulings on admissibility of evidence, are not recognized by statute but are nonetheless commonly used as additions to defense motion practice. *State v. Wright*, 2003 WI App 252, 268 Wis. 2d 694.
2. See *State v. Sigarroat*, 2004 WI App 16, ¶ 30, 269 Wis. 2d 234, for suggested procedure for ensuring compliance with in limine orders.

J. Motion to Substitute Counsel and for Continuance [§ 17.679]

Right to retain chosen counsel may, in some circumstances, require trial court to adjourn proceedings, including trial, to allow substitution of counsel. *Carlson v. Jess*, 507 F. Supp. 2d 968 (E.D. Wis. 2007).

VIII. PLEAS OF GUILTY AND NO-CONTEST PLEAS [§ 17.680]

See generally [Benchbook](#), *supra* § [17.2](#), chs. CR 4, CR 13, CR 43.

A. Plea Negotiations and Counsel's Obligations [§ 17.681]

1. It is a defendant's decision to enter a plea or go to trial. *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004).

2. A defendant has a right to effective assistance of counsel during plea negotiations. *Missouri v. Frye*, 566 U.S. 134 (2012); *see also State v. Ludwig*, 124 Wis. 2d 600 (1985).
3. Defense counsel must notify clients of any plea offer from the prosecution. *Frye*, 566 U.S. 134; *Ludwig*, 124 Wis. 2d 600.
4. Defense counsel has an obligation to provide correct advice about the possible immigration consequences of a plea to noncitizen clients. *See Lee v. United States*, 137 S. Ct. 1958 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63; *see also* Davorin J. Odrčić et al., *Immigration Consequences of Wisconsin Criminal Offenses* (State Bar of Wis. 2d ed. 2021).
5. Defense counsel has an obligation to advise clients regarding the costs and benefits of a trial versus a plea agreement. *See SCR* 20:1.2; *Frye*, 566 U.S. at 144–46.

The determination of the advisability of a guilty plea usually requires a complex cost-benefit analysis that takes into account: (i) the likelihood of winning the case at trial; (ii) the chances that the judge, in the event of conviction, would penalize the defendant at sentencing for going to trial and—in the judge’s opinion—wasting the court’s time and (if the defendant testifies) perjuring himself or herself on the witness stand; and (iii) a number of specific advantages that, in any particular case, could be gained through a guilty plea.

See Anthony G. Amsterdam & Randy Hertz, *Trial Manual 6 for the Defense of Criminal Cases* § 15.3 (6th ed. 2016), https://www.ali.org/media/filer_public/bc/49/bc49442c-9d4d-477d-82c7-b389e7c549d6/trial-manual-complete.pdf; *see also Criminal Defense Manual*, *supra* § 17.2, §§ 6.34, 6.35.

NOTE: One of defense counsel’s most important functions is exploring plea negotiations. Not only may the lawyer properly do this, but a lawyer violates the obligations of competent representation by failing to pursue plea-bargaining opportunities that could produce a better outcome for the client than a trial. *See Frye*, 566 U.S. 134; *see also Lafler v. Cooper*, 566 U.S. 156, 174 (2012) (finding ineffective assistance of counsel when counsel advised client to reject plea offer based on mistaken view of the law, which resulted in conviction and “minimum sentence 3½ times greater than [client] would have received under the plea”).

B. Plea Agreements [§ 17.682]

1. The sentencing court may not participate in plea negotiations. *State v. Williams*, 2003 WI App 116, 265 Wis. 2d 229.
2. The sentencing court is not bound by the plea agreement because it is not a party to it. *State v. McQuay*, 154 Wis. 2d 116, 128 (1990); *see also State v. Hampton*, 2004 WI 107, 274 Wis. 2d 379. The court must advise the defendant that the court need not follow the prosecutor’s recommendation. *See Hampton*, 2004 WI 107, ¶ 38, 274 Wis. 2d 379.
3. Plea agreements must be placed on the record. *State v. Lee*, 88 Wis. 2d 239, 250–51 (1979).
4. The court may reject a prosecutor’s decision to dismiss or amend charges as part of a plea agreement if it finds that it is not in the public’s interest to do so. *State v. Conger*, 2010 WI 56,

325 Wis. 2d 664; *State v. Kenyon*, 85 Wis. 2d 36 (1978); *State v. Lloyd*, 104 Wis. 2d 49 (Ct. App. 1981).

5. The parties cannot agree to conceal relevant sentencing information from the court as part of the plea agreement. *Grant v. State*, 73 Wis. 2d 441 (1976).

NOTE: Information disclosed by a defendant during a debrief with law enforcement may be disclosed to the court at sentencing if the information relates to the nature of the crime of conviction, the character of the defendant, or public safety. *Id.*

6. Deferred prosecution agreements (DPAs).
 - a. For DPAs involving accusations of domestic abuse and child sexual abuse, see [Wis. Stat. § 971.37](#).
 - b. For DPAs involving accusations of worthless checks, see [Wis. Stat. § 971.41](#).
 - c. For DPAs involving counties with a population of less than 100,000, see [Wis. Stat. § 971.39](#).
 - d. For offenses ineligible for DPAs, see [Wis. Stat. § 967.055\(3\)](#).

NOTE: DPAs may be offered in cases unrelated to the offenses listed above and are governed by principles of contract law. See *State v. Kaczmariski*, 2009 WI App 117, ¶ 10, 320 Wis. 2d 811.

7. Breach of a plea agreement.
 - a. A defendant has a “constitutional right to the enforcement of a negotiated plea agreement.” *State v. Williams*, 2002 WI 1, ¶ 37, 249 Wis. 2d 492 .
 - b. Prosecutors breach a plea agreement when they fail to present the negotiated sentencing recommendation to the circuit court. See *Williams*, 2002 WI 1, ¶ 38, 249 Wis. 2d 492.
 - c. Defense counsel must object to the breach at the time of sentencing to avoid forfeiture and maintain the right to directly challenge the breach on appeal. *State v. Howard*, 2001 WI App 137, 246 Wis. 2d 475.
 - d. The court has discretion to determine the remedy for a material and substantial breach of the plea agreement by the prosecutor. The court may vacate the plea agreement or may order resentencing by a different judge under the terms of the original plea agreement. *Id.* ¶¶ 30–37. A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained. *Id.* ¶ 15.

C. Statutory Requirement of Personal Appearance [§ 17.683]

See generally [Wis. Stat. §§ 971.04, 967.08](#).

1. A defendant in a criminal proceeding has a statutory right to be in the same courtroom as the presiding judge during the plea hearing. [Wis. Stat. § 971.04\(1\)\(g\)](#); *State v. Soto*, 2012 WI 93,

¶ 34, 343 Wis. 2d 43. A defendant may waive this right and appear by telephone or live audiovisual means if both parties consent and the court permits. [Wis. Stat.](#) § 967.08.

2. If the defendant appears by telephone, the record must show the following to establish valid waiver of the right to be present:
 - a. The court informed the defendant unambiguously of right to be present in person.
 - b. The court inquired as often as necessary whether defendant could hear and understand other participants at the hearing.

See *State v. Anderson*, 2017 WI App 17, ¶¶ 42–50, 374 Wis. 2d 372.

D. Guilty-Plea Procedure [§ 17.684]

See generally [Wis. Stat.](#) § 971.08; *State v. Bangert*, 131 Wis. 2d 246 (1986); [Wis. JI](#)—Criminal SM-32 (outlining procedures for accepting a plea of guilty). See also *State v. Howell*, 2007 WI 75, 301 Wis. 2d 350; *State v. Taylor*, 2013 WI 34, 347 Wis. 2d 30; *State v. Brown*, 2006 WI 100, ¶¶ 22, 34, 293 Wis. 2d 594 (“reexamin[ing] the legal tenets fundamental to guilty pleas” and “restate[ing] and supplement[ing] the *Bangert* outline”).

1. As a matter of due process, the defendant’s plea must be knowingly, intelligently, and voluntarily entered. *State v. Pegeese*, 2019 WI 60, ¶ 23, 387 Wis. 2d 119.
2. To ensure the plea satisfies that constitutional demand, the court must personally address the defendant to do the following:
 - a. Determine the extent of the defendant’s education and overall comprehension to assess the defendant’s capacity to understand the proceedings, *Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594;
 - b. Ascertain whether the defendant received any promises or agreements (beyond what is contained in any written plea agreement) or threats to induce the defendant to waive the defendant’s rights and plead guilty, *id.*;
 - c. Alert the defendant to the possibility that the defendant’s attorney may discover defenses not apparent to a layperson, *id.*;
 - d. Ensure the defendant knows that the defendant is entitled to a defense attorney, and if indigent, that an attorney will be provided at no expense to the defendant, *id.*;
 - e. Establish the defendant’s understanding of the nature of the offense and the range of potential punishments, *id.*;

NOTE: Simply asking whether the defendant understands the nature of the charge is not enough. The defendant’s understanding may be established by reading the jury instructions, by having defense counsel or the defendant summarize counsel’s explanation of the charge, or by referring to other evidence showing the defendant’s understanding of the nature of the charge. *Id.* ¶¶ 46–48.

- f. Determine whether a factual basis exists to support the plea, *id.* ¶ 35;
- g. Inform the defendant and make sure the defendant understands the constitutional rights being given up by pleading guilty, *id.*;
- h. Establish that the defendant understands that the court is not bound by the terms of the plea agreement, *id.*;
- i. Notify the defendant of the direct consequences of the plea, *id.*;
- j. Advise that if the defendant is “not a citizen of the United States of America, ... a plea of guilty or no contest [to] the offense [or offenses] ... may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law,” as provided in [Wis. Stat.](#) § 971.08(1)(c), *Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594; and
 - (1) The defendant cannot waive or forfeit the right to receive this warning. *State v. Vang*, 2010 WI App 118, ¶ 14, 328 Wis. 2d 251.
 - (2) The court’s failure to provide this immigration warning may allow the defendant to withdraw a guilty plea. [Wis. Stat.](#) § 971.08(2); *State v. Baeza*, 174 Wis. 2d 118 (Ct. App. 1993);
 - (3) Defense counsel’s erroneous advice about immigration consequences that prejudices the defendant may be ineffective assistance of counsel. *See Lee v. United States*, 137 S. Ct. 1958 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63; *State v. Ortiz-Mondragon*, 2015 WI 73, 364 Wis. 2d 1; *see also* Odracic et al., *supra* § 17.49, ch. 3.
 - (4) The court cannot require a defendant to disclose the defendant’s citizenship status at a plea hearing. [Wis. Stat.](#) § 971.06(3).
- k. Confirm that the prosecutor has complied with the victim’s rights statutes, *see, e.g.*, [Wis. Stat.](#) § 950.04, and Wis. Const. art. I, § 9m (Marsy’s Law). *But see Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm’n*, No. 2020AP2003 (Wis. Feb. 17, 2022), *granting certification requested by* No. 2020AP2003 (Wis. Ct. App. Dec. 21, 2021) (requesting that supreme court determine whether Marsy’s Law was validly enacted).

E. No-Contest Pleas [§ 17.685]

See generally [Wis. Stat.](#) § 971.08.

1. A no-contest plea allows a defendant not to make any admissions of specific conduct that could be used against the defendant in a later criminal or civil proceeding. [Wis. Stat.](#) § 904.10.
2. A plea of no contest constitutes an implied admission of guilt and puts the defendant in the same position as if the defendant had entered a guilty plea to the offense. *See State v. Liebnitz*, 231 Wis. 2d 272, 284 (1999); *see also State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 631–32 (1998).

3. A trial court has the discretion to accept or refuse a no-contest plea. *Brozosky v. State*, 197 Wis. 446, 452 (1928).
4. The trial court must be satisfied that the defendant committed the offense. [Wis. Stat.](#) § 971.08(1)(b); *see also State v. Bangert*, 131 Wis. 2d 246, 262 (1986); *cf. State v. Tourville*, 2016 WI 17, ¶¶ 40–41, 367 Wis. 2d 285. Specifically, at the time of plea the court must have a sufficient factual basis to “substantially negate [the] defendant’s claim of innocence.” *Warren v. Schwarz*, 219 Wis. 2d at 645.

F. *Alford* Pleas [§ 17.686]

1. Wisconsin permits “*Alford* pleas,” in the court’s discretion, in which the defendant pleads guilty while either maintaining the defendant’s innocence or not admitting having committed the crime. *State v. Nash*, 2020 WI 85, ¶ 33, 394 Wis. 2d 238; *State v. Garcia*, 192 Wis. 2d 845, 856–57 (1995); *see also North Carolina v. Alford*, 400 U.S. 25, 37 (1970).
2. An *Alford* plea puts the defendant in the same position as if found guilty by a jury verdict but does not constitute an express admission that the defendant committed the act. *Nash*, 2020 WI 85, ¶ 34, 394 Wis. 2d 238.
3. Concerns with *Alford* pleas (beyond that a person proclaiming innocence gives up the right to trial) include that the sentencing court may view the defendant’s failure to accept responsibility negatively and that treatment programs for a defendant on supervision, particularly for sex offenses, may require the defendant to admit guilt or face revocation of probation. *See State ex rel. Warrren v. Schwarz*, 219 Wis. 2d 615 (1998).

G. Read-in Offenses and Repeater Enhancements [§ 17.687]

1. Read-in Offenses
 - a. The court may consider read-in charges when imposing a sentence, but the maximum penalty of the offense of conviction will not be increased.
 - b. A defendant may be required to pay restitution on read-in charges.
 - c. The state is prohibited from future prosecution of read-in charges. *State v. Sulla*, 2016 WI 46, ¶¶ 31–35, 369 Wis. 2d 225.
2. Repeater enhancements
 - a. The convictions supporting a repeater enhancement must be proved or admitted. *See Wis. Stat.* § 973.12; *State v. Rachwal*, 159 Wis. 2d 494 (1991); *State v. Zimmerman*, 185 Wis. 2d 549 (Ct. App. 1994); *State v. Goldstein*, 182 Wis. 2d 251 (Ct. App. 1994).
 - b. A certified judgment of conviction attached to the charging document is sufficient to prove predicate convictions. *State v. Flowers*, 221 Wis. 2d 20, 32 (Ct. App. 1998).

A persistent repeater is subject to life imprisonment without parole or extended supervision. A defendant’s admission of validity of persistent-repeater allegation is sufficient, except when based on an out-of-state conviction, in which case the court must make an independent determination beyond a reasonable doubt that the out-of-state

conviction is comparable to a Wisconsin serious felony. See [Wis. Stat.](#) § 939.62(2m); *State v. Collins*, 2002 WI App 177, 256 Wis. 2d 697.

H. Withdrawing a Plea Before Sentencing [§ 17.688]

1. A defendant may withdraw a guilty plea before sentencing when the defendant demonstrates by preponderance of the evidence that there is a fair and just reason to do so. *State v. Kivioja*, 225 Wis. 2d 271, 294–95 (1999).
2. “A fair and just reason contemplates the mere showing of some adequate reason for the defendant’s change of heart.” *Id.* at 284 (internal quotation marks omitted). Whether the defendant has shown an adequate reason is up to the discretion of the court. *Id.*
3. A circuit court should liberally allow a defendant to withdraw a plea for any fair and just reason, unless the prosecution can show substantial prejudice. *Id.* at 283–84; see also *State v. Jenkins*, 2007 WI 96, ¶ 29, 303 Wis. 2d 157 (“[T]he court has consistently articulated a liberal rule for plea withdrawal before sentencing....”).
4. When a guilty plea is not knowing, intelligent, or voluntary, the defendant is entitled to withdraw a plea as a matter of right. *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594.

I. Withdrawing a Plea After Sentencing [§ 17.689]

1. A defendant may withdraw a guilty plea after sentencing if the defendant demonstrates by clear and convincing evidence that withdrawal is necessary to correct a “manifest injustice.” *State v. Shata*, 2015 WI 74, ¶ 29, 364 Wis. 2d 63.
2. A defendant can meet the burden of establishing manifest injustice by demonstrating one of the following:
 - a. The defendant had ineffective assistance of counsel. *Id.*
 - b. The plea was not made knowingly, intelligently, or voluntarily. *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594.
 - (1) When a defendant makes a prima facie case that the court failed to comply with [Wis. Stat.](#) § 971.08, or other mandatory procedures, and the defendant did not know or understand the information that should have been provided, the burden shifts to the state to show by clear and convincing evidence that the plea was nonetheless knowing, voluntary, and intelligently entered. *State v. Bangert*, 131 Wis. 2d 246, 274 (1986).
 - (2) When a defendant establishes that a plea is “constitutionally infirm,” the defendant is entitled to a withdrawal as a matter of right. *State v. Cain*, 2012 WI 68, ¶ 21, 342 Wis. 2d 1.
 - (3) A defendant may withdraw plea if not notified of all potential punishments resulting from a plea. *State v. Finley*, 2016 WI 63, ¶ 95, 370 Wis. 2d 402.
 - c. The prosecutor breached the plea agreement. *State v. Daley*, 2006 WI App 81, ¶ 20, n.3, 292 Wis. 2d 517.

- d. The circuit court agreed to let the defendant withdraw the plea if the court deviated from the plea agreement. *Id.*
- e. Evidence material to the issue of the case is discovered after conviction. *State v. McAlister*, 2018 WI 34, ¶ 31, 380 Wis. 2d 684.

IX. TRIAL [§ 17.690]

A. Defendant's Right to Be Present [§ 17.691]

See generally [Wis. Stat.](#) §§ 971.04, 967.08; *State v. Washington*, 2018 WI 3, 379 Wis. 2d 58.

A defendant has a constitutional and statutory right to be present during his or her trial; the right may be waived by the defendant.

B. Jury Procedures [§ 17.692]

- 1. In general
 - a. Civil rules regarding empaneling, qualifying, selecting, and instructing jury apply to criminal cases. [Wis. Stat.](#) §§ 756.02, 756.04, 972.01, 972.02(2); *State v. Carlson*, 2003 WI 40, 261 Wis. 2d 97.
 - b. Trial is by 12-member jury unless
 - (1) Defendant waives; *and*
 - (2) State consents (need not justify refusal to consent except in extraordinary circumstances), *State v. Cook*, 141 Wis. 2d 42 (Ct. App. 1987); *and*
 - (3) Court approves, *State v. Burks*, 2004 WI App 14, 268 Wis. 2d 747. See generally [Wis. Stat.](#) § 972.02 (jury trial; waiver); *State v. Hansford*, 219 Wis. 2d 226 (1998) (noting that Wis. Const. art. I, § 7, guarantees right to 12-member jury).
 - c. Challenges to jury array must show departure from law governing jury selection. [Benchbook](#), *supra* § [17.2](#), ch. CR 23.
- 2. Voir dire selection of jury. *Turner v. Murray*, 476 U.S. 28 (1986); [Benchbook](#), *supra* § [17.2](#), ch. CR 23.
 - a. Generally done by counsel following introductory questions by court.
 - b. May be individualized and sequestered if substantial pretrial publicity or sensitive areas to be examined. *State v. Koch*, 144 Wis. 2d 838 (1988).
 - c. Must allow bias inquiries; parties are entitled to honest answers. *State v. Delgado*, 223 Wis. 2d 270 (1999).

- d. Court must strike for cause any juror who is not indifferent. [Wis. Stat.](#) § 805.08(1); *State v. Faucher*, 227 Wis. 2d 700 (1999).
 - e. Each side allowed four peremptory challenges unless penalty is life imprisonment, then six each (numbers change in trials with multiple defendants). [Wis. Stat.](#) § 972.03.
 - (1) Cannot be exercised to exclude racial group. *Powers v. Ohio*, 499 U.S. 400 (1991); *Holland v. Illinois*, 493 U.S. 474 (1990); *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Lopez*, 173 Wis. 2d 724 (Ct. App. 1992).
 - (2) Cannot be exercised to exclude gender group. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
 - f. Court may order that additional jurors be empaneled. [Wis. Stat.](#) § 972.04.
 - (1) Each side is allowed one additional peremptory challenge if additional jurors to be empaneled. [Wis. Stat.](#) § 972.03.
 - (2) Additional jurors struck by lot before deliberations commence. [Wis. Stat.](#) §§ 972.04, 972.10(7).
 - g. Sequestration of jurors is discretionary in all cases. [Wis. Stat.](#) § 972.12.
 - h. Anonymous juries or voir dire by numbers allowed if court makes individualized determination that jury needs protection and takes reasonable precautions to minimize prejudicial effect to defendant. *State v. Tucker*, 2003 WI 12, 259 Wis. 2d 484.
3. Jury views. [Wis. Stat.](#) § 972.06; [Wis. JI](#)—Crim. 152.
- a. Must be on record.
 - b. No communication permitted between parties and jury during view.

C. Trial to Be Open to Public [§ 17.693]

See generally State v. Ndina, 2009 WI 21, 315 Wis. 2d 653; *State v. Vanness*, 2007 WI App 195, 304 Wis. 2d 692.

Defendant may forfeit the right to a public trial when the defendant knows of the court's order to exclude the public from the courtroom but fails to object. *State v. Pinno*, 2014 WI 74, ¶ 100, 356 Wis. 2d 106.

D. Jury Instructions [§ 17.694]

1. Defense attorney should always draft instructions to fit specific case.
2. Defense should request theory of defense.
3. Failure to object at instruction conference (with specific grounds for objection) to jury instruction or to court's failure to give requested instruction results in waiver. [Wis. Stat.](#)

§ 805.13(3); *see State v. Schumacher*, 144 Wis. 2d 388 (1988). *But cf. Vollmer v. Luety*, 156 Wis. 2d 1 (1990).

E. Jury Verdict [§ 17.695]

1. Must be unanimous in criminal trial.
2. May be 5/6 in responsibility phase of trial upon plea of not guilty by reason of mental disease or defect. [Wis. Stat.](#) § 971.165(2); *State v. Koput*, 142 Wis. 2d 370 (1988).

X. SENTENCING [§ 17.696]

See generally Benchbook, supra § 17.2, ch. CR 37.

A. Defendant Has Right to Be Present [§ 17.697]

See generally Wis. Stat. §§ 971.04, 967.08.

1. Right is not forfeited by defendant's absence. *State v. Koopmans*, 210 Wis. 2d 670 (1997).
2. Defendant may waive right and proceed by videoconferencing or by telephone if both parties consent and the court permits. *See Wis. Stat.* § 967.08; *State v. Soto*, 2012 WI 93, 343 Wis. 2d 43; *State v. Anderson*, 2017 WI App 17, 374 Wis. 2d 372. The waiver must be knowing, intelligent, and voluntary. *Anderson*, 2017 WI App 17, 374 Wis. 2d 372.

B. Counsel's Obligations [§ 17.698]

1. Counsel's obligations continue through sentencing.
2. Defendant and counsel allowed to make statements before sentencing. [Wis. Stat.](#) § 972.14(2).
3. If court orders presentence investigation (PSI) report under [Wis. Stat.](#) § 972.15, counsel must review it.
 - a. Court must disclose PSI report to defendant and attorney before sentencing; counsel, not defendant, entitled to copy of PSI report; nondisclosure must be raised at sentencing. [Wis. Stat.](#) § 972.15; *State v. DeMars*, 171 Wis. 2d 666 (Ct. App. 1992); *State v. Skaff*, 152 Wis. 2d 48 (Ct. App. 1989).
 - b. Because PSI report goes to prison and parole commission, factual errors should be pointed out to court and corrections sought.
 - c. Challenges to factual accuracy must be raised at sentencing or are waived. *State v. Mosley*, 201 Wis. 2d 36 (Ct. App. 1996). But when "previously unknown information is raised by the circuit court at the sentencing hearing, a defendant does not forfeit a direct challenge to the use of the information by failing to object at the sentencing hearing." *State v. Counihan*, 2020 WI 12, ¶ 4, 390 Wis. 2d 172.
 - d. Evaluate PSI report's compliance with sentencing guidelines, if applicable. *State v. Grady*, 2007 WI 81, 302 Wis. 2d 80; *State v. Firebaugh*, 2011 WI App 154, 337 Wis. 2d 670.

4. Object to any breach of plea agreement by state and decide whether to request sentencing before a different judge, untainted by the breach. *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492; *State v. Smith*, 207 Wis. 2d 258 (1997).
5. Court-ordered PSIs are confidential; defense PSIs are not. *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444.
6. Victim is allowed to review PSI recommendation and information pertaining to victim. [Wis. Stat.](#) § 972.15(4r).

C. Rebuttal by Defendant [§ 17.699]

See generally State v. Damaske, 212 Wis. 2d 169 (Ct. App. 1997).

Defendant is entitled to opportunity to rebut evidence offered at sentencing, although not necessarily by cross-examination.

D. Credit for Time Served [§ 17.700]

See generally Wis. Stat. § 973.155; *State v. Thomas*, 2021 WI App 59, 399 Wis. 2d 165; *State v. Kontny*, 2020 WI App 30, ¶¶ 1–2, 392 Wis. 2d 311; *State v. Piggue*, 2016 WI App 13, 366 Wis. 2d 605; *State v. Presley*, 2006 WI App 82, 292 Wis. 2d 734; *State v. Thompson*, 225 Wis. 2d 578 (Ct. App. 1999).

E. Stay of Execution [§ 17.701]

See generally Wis. Stat. § 973.15(8).

1. Sentencing court may stay execution of sentence of imprisonment.
2. Stay must be
 - a. For legal cause (includes appeal), *or*
 - b. Under [Wis. Stat.](#) § 973.09(1)(a) (probation), *or*
 - c. For not more than 60 days.

F. Restitution [§ 17.702]

See generally Wis. Stat. § 973.20; *State v. Tarlo*, 2016 WI App 81, 372 Wis. 2d 333; *State v. Haase*, 2006 WI App 86, 293 Wis. 2d 322.

Governmental agency not entitled to restitution for collateral expense incurred in normal course of law enforcement.

G. Expungement [§ 17.703]

See generally [Wis. Stat.](#) § 973.015; *State v. Lickes*, 2021 WI 60, 397 Wis. 2d 586; *State v. Matasek*, 2014 WI 27, 353 Wis. 2d 601; *State v. Helmbrecht*, 2017 WI App 5, ¶ 12, 373 Wis. 2d 203.

1. Court may order expungement for misdemeanors and low-level felonies at time of sentencing under certain circumstances; expungement decision must be made “at the time of sentencing,” which includes the time of placing on probation. A sentence-modification hearing does not qualify as “at the time of sentencing,” so it cannot be requested then. *State v. Arberry*, 2018 WI 7, ¶ 22, 379 Wis. 2d 254.
2. Court must make a record of its rationale for granting or denying expungement; the “utterance of ‘magic words’” is insufficient. *Helmbrecht*, 2017 WI App 5, ¶ 12, 373 Wis. 2d 203.
3. Court may order expungement for victim of trafficking for the purposes of a commercial sex act. [Wis. Stat.](#) § 973.015(2m).
4. Court must order expungement upon successful completion of a sentence for a voyeurism conviction if the person was under the age of 18 when he or she committed the offense. [Wis. Stat.](#) § 973.015(1m)(a)2.
5. Successful completion of the sentence for expungement purposes means:
 - a. No conviction of a subsequent offense.
 - b. If on probation, the probation has not been revoked.
 - c. If on probation, the defendant has satisfied the conditions of probation.

[Wis. Stat.](#) § 973.015(1m)(b); *Lickes*, 2021 WI 60, ¶ 16, 397 Wis. 2d 586.
6. If court orders expungement at time of sentencing, the defendant’s successful completion of probation automatically entitles the defendant to expungement. *State v. Hemp*, 2014 WI 129, 359 Wis. 2d 320. “Successful completion of a sentence” requires that the defendant not have any violation of DOC- or court-imposed probation conditions. See *Lickes*, 2021 WI 60, ¶ 26, 397 Wis. 2d 586.
7. The court must deny expungement if the defendant has violated a condition of probation, including DOC probation rules, even when the defendant has otherwise successfully completed the probationary sentence. *Lickes*, 2021 WI 60, 397 Wis. 2d 586; *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1.
8. Civil forfeiture violations cannot be expunged. *Kenosha Cnty. v. Frett*, 2014 WI App 127, 359 Wis. 2d 246.

XI. POSTCONVICTION MOTIONS AND APPEALS [§ 17.704]

See generally [Benchbook](#), *supra* § 17.2, chs. CR 39, 40, 42.

A. Counsel’s Obligations [§ 17.705]

See generally *Whitmore v. State*, 56 Wis. 2d 706, 717–20 (1973).

1. Trial counsel's obligations continue until defendant decides whether to seek postconviction relief.
2. Trial counsel has duty to assist defendant in making decision.

B. Notice of Intent to Pursue Postconviction Relief [§ 17.706]

See generally [Wis. Stat.](#) § 809.30(2).

1. Appellate process initiated by filing notice in trial court within 20 days after sentencing.
2. Notice goes to circuit court and district attorney.
3. Notice must state
 - a. Case name and court caption,
 - b. Judgment from which defendant will seek postconviction relief and date granted or entered,
 - c. Name and address of defendant and counsel, and
 - d. Public or private counsel status.
4. If, after notice filed, client decides not to pursue appeal, counsel should memorialize discussion content and decisional process for file. *State v. Flores*, 170 Wis. 2d 272 (Ct. App. 1992).

C. Motion to Modify Sentence [§ 17.707]

See generally [Wis. Stat.](#) §§ 809.30(2), 973.19.

1. Must be considered as part of postconviction process.
2. Timing differs if trial transcripts ordered or if motion seeks to amend conditions of probation. *State v. McCready*, 2000 WI App 68, 234 Wis. 2d 110.

D. Postconviction and Appeal Statutory Procedures [§ 17.708]

See generally [Wis. Stat.](#) § 809.30.

1. Procedures governing timing for ordering transcripts, filing motions, etc., set forth in statutes.
2. Bail on appeal or postconviction motion governed by statutes. [Wis. Stat.](#) §§ 809.31, 969.01(2).
3. Stay of execution of sentence may be granted by court either for appeal or for period up to 60 days to allow defendant to put affairs in order. [Wis. Stat.](#) § 973.15(8).

4. See Appellate Div., Wis. State Pub. Defender, *Appellate Practice and Procedure for SPD-Appointed Counsel* (4th ed. Aug. 2020), <https://wispd.org/images/AppellateFolder/templatesforms/AppellateHandbookAug2020.pdf>.

E. Counsel for Subject of State Sexually Violent Person Petition [§ 17.709]

1. An agency having control over custody of a person may request that the Department of Justice file a petition seeking to declare that person sexually violent. See [Wis. Stat.](#) § 980.02(1)(a). Alternatively, the district attorney may file a petition. [Wis. Stat.](#) § 980.02(1)(b).
2. “[A]s soon as practicable”—presumably upon its receipt of a sexually violent person petition—“the court shall refer the person” to the state public defender for appointment of counsel. See [Wis. Stat.](#) § 980.03(2).

Chapter 18

Probating an Estate

Emily G. Loe

Hale, Skemp, Hanson, Skemp & Sleik
La Crosse, WI

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-117 (May 6, 2022); all references to Treasury regulations (Treas. Reg.) are current through 87 Fed. Reg. 27,437 (May 6, 2022); and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Jan. 29, 2022.

I. INTRODUCTION [§ 18.710]

A. In General [§ 18.711]

NOTE: The U.S. Supreme Court has held that all states must allow and recognize same-sex marriages. *Obergefell v. Hodges*, 576 U.S. 644 (2015). All references in this chapter to “spouse” should be read to include same-sex partners if the couple is or was married.

1. Definition
 - a. Probate is the court-supervised transfer of a decedent’s assets to the persons or entities entitled to receive those assets. The process protects the rights of debtors, creditors, heirs, and beneficiaries of the decedent’s estate.
 - b. Probate also includes procedures for non-court-supervised transfers.
2. Three-part process. *Anthony v. Draheim (In re Est. of Hertzfeld)*, 10 Wis. 2d 333, 338 (1960).

- a. Collect probate assets owned by or owed to decedent.
 - b. Pay decedent's debts, taxes, and costs of administration.
 - c. Distribute balance of decedent's property pursuant to decedent's will or, if no will, pursuant to statutes.
3. Methods
- a. There are several methods for transferring decedent's probate assets (e.g., formal probate, informal probate, summary settlement, summary assignment, and transfer by affidavit).
 - b. Some simplified methods are available.
 - (1) Designed to save time, money; do not require appointment of a personal representative or special administrator.
 - (2) May be used only if the estate has a fair market value on date of death that does not exceed the amount designated in statute, which is currently \$50,000; an accurate valuation of the estate must be made before using one of the simpler methods.

B. Resources [§ 18.712]

1. Jennifer R. D'Amato et al., [*Wisconsin Probate System: Forms and Procedures Handbook*](#) (State Bar of Wis. 5th ed. 2019 & Supp.).
2. Neal E. Schmidt, *Wisconsin Estate Tax Handbook* (2003).
3. *Wisconsin Probate and Estate Planning Statutes* (State Bar of Wis. 2022).
4. Patrick V. Anderl et al., [*Eckhardt's Workbook for Wisconsin Estate Planners*](#) (State Bar of Wis. 7th ed. 2019 & Supp.).
5. [*Marital Property Law & Practice in Wisconsin*](#) (State Bar of Wis. 5th ed. 2019).

II. JURISDICTION [§ 18.713]

A. Decedent Domiciled in Wisconsin [§ 18.714]

Estate is administered in decedent's county of domicile at time of death. [Wis. Stat.](#) § 856.01(1).

B. Decedent Not Domiciled in Wisconsin [§ 18.715]

1. Estate is administered in any county where decedent's property is located. [Wis. Stat.](#) § 856.01(2).
2. Court that first exercises jurisdiction over some property subject to probate in Wisconsin has exclusive jurisdiction. [Wis. Stat.](#) § 856.01(2).

III. USE OF FORMS [§ 18.716]

A. Uniform Forms [§ 18.717]

See [Wis. Stat.](#) § 879.47.

Either uniform forms or computer-generated forms (if they exactly recreate the original forms in wording, format, and substance) must be used, or court may refuse to receive and file.

B. Resources [§ 18.718]

1. Forms referred to in this chapter that carry the prefix “PR” are mandatory court forms. Probate forms and the probate forms index may be downloaded for free from the Wisconsin Court System’s website at <https://www.wicourts.gov/forms1/circuit/index.htm> (last updated Mar. 17, 2022).
2. All relevant forms are contained in *Wisconsin Probate System*, *supra* § 18.3.
3. Most forms can be purchased from the State Bar of Wisconsin, <https://marketplace.wisbar.org/Browse-All/Online-Forms> (last visited Apr. 4, 2022); a legal form printing company; or from register in probate or probate registrar.
4. IRS forms may be obtained at <https://www.irs.gov/forms-instructions> (last reviewed or updated Aug. 6, 2021).
5. Electronic filing (e-filing) of probate cases became mandatory in all Wisconsin counties on March 1, 2018. For additional information on e-filing, see Wis. Ct. Sys., *eFile/eCourts: Circuit Court eFiling*, <https://www.wicourts.gov/ecourts/efilecircuit/index.jsp> (last updated Feb. 13, 2022).

IV. METHODS FOR TRANSFER OF DECEDENT’S ASSETS [§ 18.719]

A. Informal Administration [§ 18.720]

See [Wis. Stat.](#) § 865.02.

1. Simplified alternative to formal probate proceedings.
2. May be used
 - a. If no will (intestate): all interested persons consent to use and agree on personal representative, and bond is furnished if required; or
 - b. If will exists (testate): will does not prohibit use of informal probate, will names personal representative who accepts appointment, and bond is furnished if required.
3. See sections [18.24–28](#), *infra*, for procedure.

B. Formal Probate [§ 18.721]

See [Wis. Stat.](#) ch. 856.

1. May be used in all cases whether or not there is a will, regardless of size of estate.
2. A personal representative “shall” appear by an attorney in any proceedings in the court. [Wis. Stat.](#) § 879.15(2).
3. See sections [18.29–31](#), *infra*, for procedure.

C. Ancillary Probate [§ 18.722]

1. Used when another state has jurisdiction over decedent but real estate or tangible personal property is located in Wisconsin. [Wis. Stat.](#) § 868.03.
2. See section [18.34](#), *infra*, for procedure.

D. Special Administration [§ 18.723]

1. Special administrator may be appointed to act in various capacities if personal representative is not appointed. [Wis. Stat.](#) § 867.07.
2. See section [18.35](#), *infra*, for procedure.

E. Transfer by Affidavit [§ 18.724]

1. Simple procedure to be used only when the value of decedent’s property subject to administration in this state does not exceed gross value of \$50,000. [Wis. Stat.](#) § 867.03(1g).
2. See section [18.36](#), *infra*, for procedure.
3. May be completed by any heir of decedent, trustee of a revocable trust created by the decedent, person named in the will to act as personal representative, or person who was guardian of decedent at time of decedent’s death. *Guardian* has the meaning given in [Wis. Stat.](#) § 54.01(10).

NOTE: A transfer by affidavit cannot be used to transfer any type of interest in real property to a person named in the will to act as personal representative unless the person is an heir, trustee of a revocable trust, or guardian at the time of decedent’s death.

- a. If decedent or decedent’s spouse received services provided as a benefit under a long-term care program as defined in [Wis. Stat.](#) § 49.496(1)(bk), medical assistance under [Wis. Stat.](#) §§ 49.43–499, long-term community-support services funded under [Wis. Stat.](#) § 46.27(7) (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785, notice must be given to the Wisconsin Department of Health Services (DHS) by certified mail at least 10 days before the heir, trustee, person named in the will to act as personal representative, or person who was guardian at time of decedent’s death files affidavit (DHS cannot collect if spouse was resident of nursing home and recipient of medical assistance).

- b. A person who receives the affidavit from a person named in the will to act as personal representative cannot transfer the assets until 30 days after the day the affidavit was received, and if that person receives an affidavit for the same decedent from another person, the person receiving the affidavits cannot transfer the assets unless ordered to do so by a court. [Wis. Stat.](#) § 867.03(1j) does not apply to an affidavit from a person who is an heir, trustee of a revocable trust, or guardian at the time of decedent's death.
- c. Upon completion of transfer (following statutory guidelines) to heir, trustee, person named in a will to act as personal representative, or person who was guardian at time of decedent's death, and furnishing affidavit, with attached proof of mail delivery, if required, transferor is released as if transfer was made to the personal representative of decedent's estate.

F. Summary Settlement [§ 18.725]

NOTE: Summary settlement is rarely used because [Wis. Stat.](#) § 867.03 now provides for use of transfer by affidavit if *gross value* does not exceed \$50,000.

1. Under [Wis. Stat.](#) § 867.01, simplified procedure limited to estates in which
 - a. Fair market value of estate, minus debts for which any estate property is security, does not exceed \$50,000 *net value*, and decedent is survived by spouse or domestic partner, minor children, or both; or
 - b. Value of estate, minus debts for which any estate property is security, does not exceed costs, expenses, allowances, and claims of estate.
2. Subject to claims of creditors unless surviving spouse's, surviving domestic partner's, or dependent children's allowance exceeds amount transferred, but court must balance needs of spouse, domestic partner, or dependent children against nature of creditors' claims. [Wis. Stat.](#) §§ 861.31, 861.33, 861.35, 861.41.
3. See section [18.37](#), *infra*, for procedure.

G. Summary Assignment [§ 18.726]

NOTE: Summary assignment is rarely used because [Wis. Stat.](#) § 867.03 now provides for use of transfer by affidavit if *gross value* does not exceed \$50,000.

1. Fair market value of estate, minus debts for which any estate property is security, does not exceed \$50,000 *net value* and the estate cannot be settled using summary settlement. [Wis. Stat.](#) § 867.02.
2. Subject to claims of creditors.
3. See section [18.38](#), *infra*, for procedure.

H. Termination of Joint Tenancy or Life Tenant's Interest in Real Estate (Administrative Transfer) [§ 18.727]

1. If all the property owned by decedent is owned jointly with others, it is only necessary to terminate joint tenancies. [Wis. Stat.](#) § 867.04.
2. Joint tenancy and life tenant's interest in real estate may be terminated administratively with the register of deeds. [Wis. Stat.](#) § 867.045.
3. See section [18.39](#), *infra*, for procedure.

I. Termination of Joint Tenancy (Judicial Transfer) [§ 18.728]

1. May be used if administrative transfer, *see supra* § [18.18](#), is not used. [Wis. Stat.](#) § 867.04.
2. See section [18.40](#), *infra*, for procedure.

J. Alternative to [Wis. Stat.](#) §§ 867.04 and 867.045 [§ 18.729]

1. Formal probate, see section [18.77](#), para. 3., *infra*.
2. Informal probate, see section [18.77](#), para. 6., *infra*.

K. Termination of Life Estate (Judicial Transfer) [§ 18.730]

1. If decedent owned only a life estate in property, decedent's interest may be terminated by securing termination of life estate, *see infra* § [18.41](#). [Wis. Stat.](#) § 867.04.
2. Life estate may be terminated administratively with the register of deeds, *see infra* § [18.39](#). [Wis. Stat.](#) § 867.045.
3. If using formal or informal proceedings, life estate may be terminated in proceedings; if formal probate, see section [18.77](#), para. 3., *infra*. [Wis. Stat.](#) § 865.20.

L. Determination of Descent of Property [§ 18.731]

1. May be used by any person interested in intestate estate if six years have elapsed since decedent's death. [Wis. Stat.](#) § 867.05.
2. See section [18.42](#), *infra*, for procedure.

M. Miscellaneous Procedures [§ 18.732]

1. Transfer of up to five vehicles less than 20 years old from decedent to surviving spouse or surviving domestic partner. No limit on the number of vehicles more than 20 years old that can be transferred. No limit if surviving spouse or domestic partner is proceeding under [Wis. Stat.](#) § 867.03(1g) and total value of decedent's property is less than \$50,000. [Wis. Stat.](#) § 342.17(4)(b); Form MV2300.
2. Transfer of vehicles to heir or guardian at time of death if decedent had no solely owned property exceeding \$50,000. *Guardian* has meaning given in [Wis. Stat.](#) § 54.01. [Wis. Stat.](#) § 867.03; Form MV2300.

3. Payment of decedent's wages to spouse, domestic partner, children, or descendants living with decedent at time of death. [Wis. Stat.](#) § 109.03(3).
4. Payment of decedent's cash bond to dependents. [Wis. Stat.](#) § 103.165(3).
5. If ward dies leaving estate that can be settled under [Wis. Stat.](#) § 867.01, court may approve settlement and distribution by guardian without appointment of personal representative. [Wis. Stat.](#) § 54.66(4).

V. INFORMAL ADMINISTRATION [§ 18.733]

See [Wis. Stat.](#) ch. 865.

A. In General [§ 18.734]

1. Simplified procedure for full probate of any size estate
 - a. Does not require court appearance for filing any document from application for informal administration to personal representative's statement to close estate; entire probate of estate may be completed through e-filing, with the exception that any original will must be mailed to or filed in person with the court.
 - b. Termination of joint tenancy and confirmation of survivorship in marital property may be accomplished upon appointment of personal representative. [Wis. Stat.](#) §§ 865.20, 865.201.
2. In informal administration, there is no procedure for resolving conflicts or obtaining judicial approval of personal representative's actions; however, it is possible to switch to formal probate and then switch back to informal administration at any stage in the proceedings to either resolve disputes or obtain judicial approval using state model form, Demand for Formal Proceedings, PR-1813. Formal proceedings may be demanded by the personal representative, any interested person, guardian or guardian ad litem (GAL) on behalf of interested person who is a minor or an individual adjudicated incompetent, or the court. [Wis. Stat.](#) § 865.03(1).
3. Proceedings are overseen by probate registrar rather than judge. [Wis. Stat.](#) § 865.01.

B. When Available [§ 18.735]

1. May be used if decedent died testate (with will), if will does not prohibit use of informal administration, the nominated personal representative accepts appointment, and bond is furnished if required. [Wis. Stat.](#) § 865.02(1)(a). A guardian or GAL may consent on behalf of interested person who is a minor or is an individual adjudicated incompetent. [Wis. Stat.](#) §§ 865.02(1)(b)1., 851.21.
2. May be used if decedent died intestate (without a will), all interested persons consent in writing to informal administration and agree on the person to be appointed personal representative, and bond is furnished if required. A guardian or GAL may consent on behalf of interested person who is a minor or is an individual adjudicated incompetent. [Wis. Stat.](#) §§ 865.02(1)(b), 851.21.

3. May apply for informal administration at any time unless someone has demanded formal administration of estate. [Wis. Stat.](#) § 865.04.

C. Informal Administration with Will (Testate) [§ 18.736]

1. Open on waiver.
 - a. In general. [Wis. Stat.](#) § 865.05(1).
 - (1) Persons who are neither minors nor individuals adjudicated incompetent may waive notice in writing and consent to an immediate review (hearing) of any matter without notice. Appointed GAL and guardians of the estate may waive notice in writing and consent to immediate review (hearing) of any matter without notice. An attorney for a person in military service may not waive notice on behalf of military person. Waiver of notice by any person is equivalent to timely service of notice. [Wis. Stat.](#) § 879.09.
 - (2) To use the *open-on-waiver* procedure, attorney must obtain waiver of notice from all interested persons.

NOTE: If a minor's interest in an estate is \$10,000 or less, the GAL should be a surviving parent; however, if no qualified parent is willing to serve, then the GAL must be an attorney. If a person is an individual adjudicated incompetent and his or her interest in an estate is \$1,000 or less and there is no qualified parent willing to serve, then the GAL should be an adult child of the individual; however, if there is neither a qualified parent nor a qualified adult child of the individual willing to serve, then the GAL must be an attorney. [Wis. Stat.](#) § 879.23(4)(b), (c).

- b. Draft the following documents:
 - (1) Application for Informal Administration. [Wis. Stat.](#) §§ 865.06, 879.01; Form PR-1801.
 - (2) Waiver and Consent. [Wis. Stat.](#) §§ 865.05(1), 879.09; Form PR-1803.
 - (3) Proof of Heirship. [Wis. Stat.](#) §§ 865.06, 863.23; Form PR-1806.
 - (4) Notice to Creditors (check with probate registrar to obtain date and time). [Wis. Stat.](#) §§ 859.01, 865.05; Form PR-1804.
 - (5) Statement of Informal Administration (Will). [Wis. Stat.](#) §§ 865.07, 865.08; Form PR-1808.
 - (6) Consent to Serve. [Wis. Stat.](#) § 865.08(2); Form PR-1807.
 - (7) Domiciliary Letters. [Wis. Stat.](#) § 865.08; Form PR-1810.
 - (8) Order Appointing Guardian ad Litem or Attorney, if GAL is required. [Wis. Stat.](#) §§ 865.02(1), 879.23; Form GF-131.

NOTE: The GAL may be dispensed with if a living person of full legal rights and capacity has a substantially identical interest to the interest of the person for whom the GAL would be appointed (virtual representation). Attorney may use Petition to Dispense with GAL and Order Dispensing with GAL for a case in which virtual representation is present. [Wis. Stat.](#) § 879.23(5); Form PR-1820; Form PR-1821.

- (9) Surety or signature bond, if required. [Wis. Stat.](#) § 865.07(1)(f); Form PR-1809 or commercial bonds.
 - (a) Check in advance with probate registrar to determine the amount and type of bond required so that the bond can be filed with the initial documents.
 - (b) Probate registrar sets bond. The probate registrar may waive bond if the will states that the personal representative may act without a bond (bond may still be required for exceptional circumstances). [Wis. Stat.](#) §§ 865.07(1)(f), 856.25.
 - (c) Amount of bond is based on estimated value of probate assets.
 - (d) Any beneficiary may stipulate to a reduction of the bond amount and that his or her share of estate stands as excess surety to the extent of reduction; probate registrar may reduce bond by the amount stipulated to by the beneficiary. [Wis. Stat.](#) § 856.25(3).
- c. E-file forms drafted at para. 1.b., *supra*, with probate registrar.
 - (1) File original will with probate registrar, by mailing or delivery to the court, if will is not in court's possession (if probated elsewhere, file authenticated copy). [Wis. Stat.](#) §§ 856.05(1), 865.06(2)(a).
 - (a) Any person except the named personal representative having custody of any will must file will in court, or deliver will to the named personal representative within 30 days after knowledge of decedent's death; and the person named personal representative must, within 30 days after knowledge of decedent's death and knowledge of appointment as personal representative, file the will with the court; any person who neglects to perform statutory duties is liable for all damages caused by the neglect. [Wis. Stat.](#) § 856.05(1).
 - (b) Any person who, with the intent to injure or defraud any person, suppresses or secretes any will of a person then deceased or any information regarding the existence and location of a will may be fined not more than \$500 or imprisoned in the county jail for not more than one year or both. [Wis. Stat.](#) § 856.05(3).
 - (2) Secure determination of requirements for informal probate from probate registrar. [Wis. Stat.](#) § 865.07.
 - (3) Secure probate registrar's approval of bond, if required. [Wis. Stat.](#) § 865.07(1)(f).
 - (4) Have personal representative appointed. [Wis. Stat.](#) § 865.08(1).
 - (5) Have the probate registrar sign Domiciliary Letters; secure from probate registrar conformed copy and also certified copies, if needed. Form PR-1810.

- (6) Have the probate registrar sign the Notice to Creditors; secure from probate registrar conformed copy and also certified copies, if needed. Form PR-1804.
- (7) Publish Notice to Creditors three times in the local newspaper (class 3 notice), with first insertion within 15 days after date of Notice. [Wis. Stat.](#) §§ 859.07, 865.05, 879.05(4), 985.07; Form PR-1804.
- (8) Mail notice to all creditors whose existence can be found by the personal representative using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48; Form PR-1804.
- (9) If decedent was a patient or inmate of any state or county hospital or institution or the decedent was responsible for any obligation to the state or county under [Wis. Stat.](#) § 46.03(18), 46.10, 48.36, 49.32(1), 49.345, 301.03(18), 301.12, or 938.36, or if decedent or decedent's spouse ever received services provided as a benefit under a long-term care program as defined in [Wis. Stat.](#) § 49.496(1)(bk), medical assistance under [Wis. Stat.](#) §§ 49.43–499, long-term community-support services funded under [Wis. Stat.](#) § 46.27(7) (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785, the personal representative must send notices of date set under [Wis. Stat.](#) § 859.01 by registered or certified mail to DHS, the Department of Children and Families, or the Department of Corrections (DOC), as applicable, and county clerk of the applicable county, not less than 30 days before date set under [Wis. Stat.](#) § 859.01, on the Probate Claims Notice, Form F-13033, from DHS. [Wis. Stat.](#) § 859.07(2); *Department of Health & Soc. Servs. v. Budney*, 197 Wis. 2d 948 (Ct. App. 1995).
- (10) E-file proof of publication by affidavit with probate registrar when received from newspaper (some newspapers send proof directly to court). [Wis. Stat.](#) §§ 879.07(3), 985.12.
- (11) For details on claims, see sections [18.58–65](#), *infra*.
- (12) After deadline for filing claims, check whether any claims filed. [Wis. Stat.](#) § 859.02(2)(a).

NOTE: A claim not filed on or before the date set by the court is not barred if it is a claim based on tort; on a marital property agreement subject to [Wis. Stat.](#) § 766.58(13)(b) or (c); on Wisconsin income, franchise, sales, withholding, gift, or death taxes; on unemployment insurance contributions due or benefits overpaid; on a claim for funeral or administrative expenses; on a claim of the state under [Wis. Stat.](#) § 46.27(7g) (2017–18), 49.496, or 49.682 or under rules promulgated under [Wis. Stat.](#) § 46.286(7); or on a claim of the United States.

- (a) Determine whether the claims filed are valid; if valid, have personal representative pay.
- (b) If claims are not valid, demand formal proceedings. [Wis. Stat.](#) § 865.03(2); Form PR-1813.
- (c) E-file objection. [Wis. Stat.](#) § 859.33(1).

- (i) If a copy of the claim has been served under [Wis. Stat. § 859.33\(1\)](#) on the personal representative or personal representative's attorney, objection must be served on or mailed to claimant and filed with court within 60 days after copy of claim was mailed or served on the personal representative or the personal representative's attorney. [Wis. Stat. § 859.33\(1\)](#).
 - (ii) After filing the objection, contact court regarding procedure for resolving issue (if necessary, court will set matter for hearing). [Wis. Stat. § 859.33\(2\)](#).
 - (13) Collect assets, *see infra* § [18.47](#).
 - (14) Prepare inventory, *see infra* § [18.49](#).
 - (15) Deal with spousal or domestic partner elections and family allowances, *see infra* §§ [18.53–57](#). [Wis. Stat. § 861.31\(1m\), \(2\)](#). If applicable, prepare and file the petition, request a formal hearing, and determine who is entitled to notice. At the hearing, take testimony as to the amount necessary for the surviving spouse or surviving domestic partner and minor children's allowance.
 - (16) Prepare income tax returns, *see infra* §§ [18.50–52](#). Request Closing Certificate for Fiduciaries from the Wisconsin Department of Revenue (DOR). *See* Wis. Dep't of Revenue, *Estates, Trusts, and Fiduciaries* FAQ 6, <https://www.revenue.wi.gov/Pages/FAQS/ise-estate.aspx#estate65> (last updated Jan. 12, 2022).
 - (17) Prepare estate account, *see infra* §§ [18.66–69](#).
 - (18) Prepare estate tax return, if required, *see infra* §§ [18.70–74](#).
 - (19) Close estate, *see infra* §§ [18.75–77](#).
2. Hearing on notice
- a. If waivers cannot be obtained, notice must be given to all interested persons. [Wis. Stat. § 865.05](#).
 - b. Initial filing
 - (1) Draft following documents:
 - (a) Application for Informal Administration (Will). [Wis. Stat. § 865.06](#); Form PR-1801.
 - (b) Notice Setting Time to Hear Application and Deadline for Filing Claims (check with probate registrar to obtain date and time). [Wis. Stat. §§ 859.07, 865.05, 865.08, 879.05](#); Form PR-1805.
 - (c) Proof of Heirship. [Wis. Stat. §§ 865.06, 879.01, 863.23](#); Form PR-1806.

- (d) Order Appointing Guardian ad Litem or Attorney, if required. [Wis. Stat.](#) §§ 865.02(1), 879.23, 879.25; Form GF-131.

NOTE: The GAL may be dispensed with if a living person of full legal rights and capacity has a substantially identical interest to the interest of the person for whom the GAL would be appointed (virtual representation). Attorney may use Petition to Dispense with GAL and Order Dispensing with GAL for a case when virtual representation is present. [Wis. Stat.](#) § 879.23(5); Form PR-1820; Form PR-1821.

- (2) File original will with probate registrar, by mailing or delivery to the court, if it is not in the court's possession (if probated elsewhere, file authenticated copy). [Wis. Stat.](#) §§ 856.05(1), 865.06(2)(a).
- (3) E-file Application for Informal Administration with probate registrar. Form PR-1801.
- (4) E-file Proof of Heirship with probate registrar. Form PR-1806.
- (5) Secure appointment of GAL, if required, or e-file Petition to Dispense with GAL and Order Dispensing with GAL, as appropriate. Form GF-131; Form PR-1820; Form PR-1821.
- (6) Obtain signature of probate registrar on original of Notice Setting Time to Hear Application and Deadline for Filing Claims. Form PR-1805.
- (7) After handling matters in paras. (2)–(6), *supra*, do the following:
- (a) Publish Notice Setting Time to Hear Application and Deadline for Filing Claims three times in the local newspaper (class 3 notice), with the first insertion within 15 days after date of Notice. [Wis. Stat.](#) §§ 859.07, 865.05, 879.03, 879.05. Form PR-1805.
- (b) Mail notice to all creditors whose existence can be found by the personal representative using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48. Form PR-1805.
- (c) Mail copy of Notice Setting Time to Hear Application and Deadline for Filing Claims together with copy of will and list of all interested persons, to all interested persons at least 20 days before hearing. [Wis. Stat.](#) §§ 851.21, 879.05(2); Form PR-1805.
- (d) If decedent was a patient or inmate of any state or county hospital or institution or the decedent was responsible for any obligation to the state or county under [Wis. Stat.](#) § 46.03(18), 46.10, 48.36, 49.32(1), 49.345, 301.03(18), 301.12, or 938.36, or if decedent or decedent's spouse ever received services provided as a benefit under a long-term care program as defined in [Wis. Stat.](#) § 49.496(1)(bk), medical assistance under [Wis. Stat.](#) §§ 49.43–.499, long-term community-support services funded under [Wis. Stat.](#) § 46.27(7) (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785, the personal representative must

send notices of date set under [Wis. Stat.](#) § 859.01 by registered or certified mail to DHS, the Department of Children and Families, or DOC, as applicable, and county clerk of the applicable county, not less than 30 days before date set under [Wis. Stat.](#) § 859.01, on the Probate Claims Notice, Form F-13033, from DHS. [Wis. Stat.](#) § 859.07(2); *Department of Health & Soc. Servs. v. Budney*, 197 Wis. 2d 948 (Ct. App. 1995).

- (e) Draft following documents:
 - (i) Affidavit of Service. [Wis. Stat.](#) § 879.07(1); Form PR-1817.
 - (ii) Statement of Informal Administration (Will). [Wis. Stat.](#) §§ 865.07, 865.08(2); Form PR-1808.
 - (iii) Consent to Serve. [Wis. Stat.](#) § 865.08(2); Form PR-1807.
 - (iv) Domiciliary Letters. [Wis. Stat.](#) § 865.08; Form PR-1810.
 - (v) Order Appointing Appraiser, if requested by an interested party. [Wis. Stat.](#) § 865.12; Form PR-1907.
 - (f) Obtain proof of publication affidavit from publisher (some newspapers send proof directly to court). [Wis. Stat.](#) §§ 879.07(3), 985.12.
 - (g) Provide signature bond, if required, *see supra* para. 1.b.(9). [Wis. Stat.](#) § 865.07(1)(f); Form PR-1809 (or commercial bonds).
 - (h) E-file the above documents with the court in advance of the court hearing.
- c. Attend court hearing.
- (1) File a copy of the Statement of Informal Administration (Will), Domiciliary Letters, and Order Appointing Appraisers, if requested by an interested party, with the court at the hearing. Form PR-1808; Form PR-1810; Form PR-1907.
 - (2) Secure determination of requirements for informal probate from probate registrar. [Wis. Stat.](#) § 865.07.
 - (3) Secure probate registrar's approval of bond, if required. [Wis. Stat.](#) § 865.07(1)(f).
 - (4) Have personal representative appointed. [Wis. Stat.](#) § 865.08(1).
 - (5) Have probate registrar sign Domiciliary Letters; obtain a conformed copy and, if needed, certified copies. Form PR-1810.
- d. After hearing
- (1) After deadline for filing claims, check if any claims filed, *see supra* para. 1.c.(12).
 - (2) Collect assets, *see infra* § [18.47](#).

- (3) Prepare inventory, *see infra* § [18.49](#).
- (4) Deal with spousal or domestic partner elections and family allowances, *see infra* §§ [18.53–.57](#). [Wis. Stat.](#) § 861.31(1m), (2). If applicable, prepare and file the petition, request a formal hearing, and determine who is entitled to notice. At the hearing, take testimony as to the amount necessary for the surviving spouse or surviving domestic partner and minor children’s allowance.
 - (a) Demand for Formal Proceedings required. Form PR-1813.
 - (b) Notice may be required.
- (5) Prepare income tax returns, *see infra* §§ [18.50–.52](#). Request Closing Certificate for Fiduciaries from the Wisconsin Department of Revenue. *See* Wis. Dep’t of Revenue, *Estates, Trusts, and Fiduciaries* FAQ 6, <https://www.revenue.wi.gov/Pages/FAQS/ise-estate.aspx#estate6> (last updated Jan. 12, 2022).
- (6) Prepare estate account, *see infra* §§ [18.66–.69](#).
- (7) Prepare estate tax return, if required, *see infra* §§ [18.70–.74](#).
- (8) Close estate, *see infra* §§ [18.75–.77](#).

D. Informal Administration Without Will (Intestate) [§ 18.737]

1. Open on waiver.

Draft the documents listed in section [18.27](#), paras. 1.b.(1)–(9), *supra*.
2. E-file documents with court.
 - a. Present forms drafted in para. 1., *supra*, to probate registrar.
 - b. Follow the procedures outlined in section [18.27](#), paras. 1.c.(3)–(8), *supra*.
3. Follow the procedures set forth in section [18.27](#), para. 1., *supra*.
4. Hearing on notice *cannot* be used when there is no will. [Wis. Stat.](#) § 865.02(1)(b)1.

VI. FORMAL PROBATE [§ 18.738]

See [Wis. Stat.](#) ch. 856.

A. Formal Probate with Will (Testate) [§ 18.739]

1. Open on waiver. *See supra* § [18.27](#), para. 1.a.(1).

- a. Draft the following documents:
- (1) Petition for Formal Administration. [Wis. Stat.](#) § 856.09; Form PR-1901.
 - (2) Waiver, Consent and Approval. [Wis. Stat.](#) § 879.09; Form PR-1902.
 - (3) Proof of Heirship. [Wis. Stat.](#) §§ 852.01, 863.23; Form PR-1806.
 - (4) Order Setting Deadline for Filing a Claim. [Wis. Stat.](#) §§ 859.07, 863.23; Form PR-1904.
 - (5) Proof of Will, if required by court. [Wis. Stat.](#) §§ 853.03, 853.04, 853.11, 856.15; Form PR-1845.

NOTE: The will may be self-proved. [Wis. Stat.](#) § 853.04.
 - (6) Order for Formal Administration. [Wis. Stat.](#) § 856.19; Form PR-1905.
 - (7) Order Appointing Guardian ad Litem or Attorney, if required; or Petition to Dispense with GAL and Order Dispensing with GAL. *See supra* § [18.27](#), para. 1.b.(8). [Wis. Stat.](#) §§ 879.23, 879.25; Form GF-131; Form PR-1820; Form PR-1821.
 - (8) Surety or signature bond (same as under informal administration, except judge or commissioner, instead of probate registrar, is to make the determination), *see supra* § [18.27](#) para. 1.b.(9). Form PR-1809.
 - (9) Consent to serve.
 - (10) Domiciliary Letters. [Wis. Stat.](#) § 856.21; Form PR-1810.
 - (11) Order Appointing Appraisers. [Wis. Stat.](#) § 858.13; Form PR-1907.
- b. E-file documents with the court.
- (1) File original will with court by mailing or delivery to the court. [Wis. Stat.](#) § 856.05(1).
 - (2) E-file forms drafted under para. 1.a., *supra*, with court.
 - (3) If required by specific county, take testimony for proof of heirship (follow order of questions in Proof of Heirship). [Wis. Stat.](#) § 856.15(1).
 - (a) Follow order of questions in Proof of Will. Form PR-1845.
 - (b) If personal testimony not required by court, file Order for Formal Administration (see [Wis. Stat.](#) § 856.15(2)–(5) if witness not readily available). [Wis. Stat.](#) § 856.15(1); Form PR-1905.
 - (4) Secure court approval of surety or signature bond, if any required. [Wis. Stat.](#) § 856.25; Form PR-1809.

- (5) Secure appointment of appraisers if requested by an interested party. [Wis. Stat.](#) §§ 858.13, 858.15; Form PR-1907.

NOTE: An appraisal is not necessary if the value of the assets is readily ascertainable without the exercise of judgment by an appraiser. [Wis. Stat.](#) § 858.15.

- (6) Have court sign Domiciliary Letters; secure conformed copies and certified copies from register in probate, if needed. Form PR-1810.
- (7) Obtain signature of court on original Order Setting Deadline for Filing a Claim and obtain a conformed copy for publication. Form PR-1904.
- (8) Publish Order Setting Deadline for Filing a Claim three times (class 3 notice) in local newspaper, with the first insertion within 15 days after date of Order. [Wis. Stat.](#) § 859.07; Form PR-1904.
- (9) Mail notice to all creditors whose existence can be found by the personal representative using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48; Form PR-1805.
- (10) Give Probate Claims Notice to DHS or DOC and county clerk of county of legal residence if circumstances require, *see supra* § [18.27](#), para. 1.c.(9). [Wis. Stat.](#) § 859.07(2); Form F-13033; *see Department of Health & Soc. Servs. v. Budney*, 197 Wis. 2d 948 (Ct. App. 1995).
- (11) E-file proof of publication by affidavit when received from newspaper (some newspapers send proof directly to court). [Wis. Stat.](#) §§ 879.07(3), 985.12.
- (12) After deadline for filing claims, if no claims have been filed, e-file Judgment on Claims with court for signature; if claims have been filed, determine whether they are valid; however, certain claims have different time limitations for filing, *see supra* § [18.27](#), note following para. 1.c.(12). [Wis. Stat.](#) §§ 859.02(2), 859.37; Form PR-1909.
 - (a) If valid, have court sign Judgment on Claims; have personal representative pay claims. [Wis. Stat.](#) § 859.33(1).
 - (b) If not valid, file objection.
 - (i) If copy of claim has been served under [Wis. Stat.](#) § 859.33(1) on the personal representative or personal representative's attorney, objection must be served on or mailed to claimant and filed with court within 60 days after copy of claim was mailed or served on personal representative or attorney for the estate. [Wis. Stat.](#) § 859.33(1).
 - (ii) After filing objection, contact court regarding procedure for resolving issue. [Wis. Stat.](#) § 859.33(2). If necessary, court will set matter for hearing.
- (13) Collect assets, *see infra* § [18.47](#).

- (14) Prepare inventory, *see infra* § [18.49](#).
- (15) Deal with spousal or domestic partner elections and family allowances, *see infra* §§ [18.53–.57](#). [Wis. Stat.](#) § 861.31(1m), (2). If applicable, prepare and file the petition, request a formal hearing, and determine who is entitled to notice. At the hearing, take testimony as to the amount necessary for the surviving spouse or surviving domestic partner and minor children’s allowance.
 - (a) Notice may be required. [Wis. Stat.](#) § 861.31(1m).
 - (b) Have Order for Allowance signed. [Wis. Stat.](#) § 861.31; *see, e.g., Wisconsin Probate System, supra* § [18.3](#), Form 4.9.
- (16) Prepare income tax returns, *see infra* §§ [18.50–.52](#).
- (17) Prepare estate account, *see infra* §§ [18.66–.69](#).
- (18) Prepare estate tax return, if required, *see infra* §§ [18.70–.74](#).
- (19) Close estate, *see infra* §§ [18.75–.77](#).

2. Hearing on notice

a. Initial filing

- (1) Draft following documents:
 - (a) Petition for Formal Administration. [Wis. Stat.](#) § 856.09; Form PR-1901.
 - (b) Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims. [Wis. Stat.](#) §§ 856.11, 859.07, 879.03, 879.05; Form PR-1903.
 - (c) Order Appointing Guardian ad Litem or Attorney, if required; or Petition Dispensing with GAL and Order Dispensing with GAL, if required. [Wis. Stat.](#) §§ 879.23, 879.25; Form GF-131; Form PR-1820; Form PR-1821.
- (2) File original will with court by mailing or delivery to the court. [Wis. Stat.](#) § 856.05(1).
- (3) E-file Petition for Formal Administration with court. Form PR-1901.
- (4) Secure appointment of GAL, if required, or present Order Dispensing with GAL. Form PR-1821.
- (5) Obtain signature of court on original Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims and obtain a conformed copy for publication. [Wis. Stat.](#) §§ 856.11, 859.07, 879.03, 879.05; Form PR-1903.
- (6) After filing

- (a) Publish Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims three times (class 3 notice) in local newspaper, with first insertion within 15 days after date of Order. [Wis. Stat.](#) §§ 856.11, 859.07, 879.05(4); Form PR-1903.
 - (b) Mail notice to all creditors whose existence can be found by the personal representative using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48.
 - (c) For details on claims, see sections [18.58–.65](#), *infra*.
 - (d) Mail copies of Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims, list of interested persons, and will to all interested parties at least 20 days before the hearing. [Wis. Stat.](#) §§ 851.21, 856.11, 879.05; Form PR-1903.
 - (e) Give Probate Claims Notice to DHS or DOC and county clerk of county of legal residence if circumstances require, *see supra* § [18.27](#), para. 1.c.(9). [Wis. Stat.](#) § 859.07; Form F-13033; *see Budney*, 197 Wis. 2d 948.
 - (f) Draft the following documents:
 - (i) Affidavit of Service. [Wis. Stat.](#) § 879.07(1); Form PR-1817.
 - (ii) Proof of Heirship. [Wis. Stat.](#) §§ 852.01, 863.23; Form PR-1806.
 - (iii) Proof of Will, if court requests testimony. [Wis. Stat.](#) §§ 853.03, 856.15; Form PR-1845.
 - (iv) Order for Formal Administration. Form PR-1905.
 - (v) Order Appointing Guardian ad Litem or Attorney, if required; or Petition to Dispense with GAL and Order Dispensing with GAL, if required. [Wis. Stat.](#) §§ 879.23, 879.25; Form GF-131; Form PR-1821.
 - (vi) Bond, if required. Form PR-1809.
 - (vii) Domiciliary Letters. [Wis. Stat.](#) § 856.21; Form PR-1810.
 - (viii) Order Appointing Appraisers. [Wis. Stat.](#) § 858.13; Form PR-1907.
 - (g) E-file the above documents with the court in advance of the court hearing.
 - (h) Obtain proof of publication affidavit from publisher and e-file it with the court (some newspapers send proof directly to court). [Wis. Stat.](#) §§ 879.07(3), 985.12.
- b. At court hearing

(1) File a copy of the Order for Administration, Domiciliary Letters, and Order Appointing Appraisers, if requested by an interested party, with the court at the hearing. Form PR-1905; Form PR-1810; Form PR-1907.

(2) Follow procedures outlined in paras. 1.b.(3)–(6), *supra*.

c. After hearing

(1) After deadline for filing claims, if no claims filed, have court sign Judgment on Claims; if claims are filed, determine whether they are valid. Note that certain claims have different time limitations for filing, *see supra* § [18.27](#), note following para. 1.c.(12). [Wis. Stat.](#) §§ 859.02(2), 859.37; Form PR-1909.

(2) Collect assets, *see infra* § [18.47](#).

(3) Prepare inventory, *see infra* § [18.49](#).

(4) Deal with spousal elections and family allowances, *see infra* §§ [18.53–57](#).

(5) Prepare income tax returns, *see infra* §§ [18.50–52](#).

(6) Prepare final account, *see infra* §§ [18.66–69](#).

(7) Prepare estate tax return, if required, *see infra* §§ [18.70–74](#).

(8) Close estate, *see infra* §§ [18.75–77](#).

B. Formal Probate Without Will (Intestate) [§ 18.740]

1. Hearing on waiver

a. Before hearing, draft documents listed in section [18.30](#), para. 1.a., *supra*, except for Proof of Will.

b. E-file documents with court.

(1) E-file forms drafted under section [18.30](#), para. 1.a., *supra*, with court. [Wis. Stat.](#) § 856.05(1).

(2) Secure court approval of surety or signature bond, if any required. [Wis. Stat.](#) § 856.25; Form PR-1809.

(3) Check clerk's office to see if form exists for Order Dispensing with Appraisal for particular county. [Wis. Stat.](#) §§ 858.13, 858.15; Form PR-1907.

(4) Secure appointment of appraisers, if required by court, or have court sign Order Dispensing with Appraisal.

NOTE: An appraisal is not necessary if the value of the assets is readily ascertainable without the exercise of judgment on the part of an appraiser. [Wis. Stat.](#) § 858.15.

- (5) Have court sign Domiciliary Letters; secure conformed copies and certified copies from register in probate, if needed.
 - (6) Obtain signature of court on conformed copy of Order Setting Deadline for Filing a Claim. Form PR-1904.
- c. After appointment; *see supra* § [18.30](#), para. 2.c.
- (1) Collect assets, *see infra* § [18.47](#).
 - (2) Prepare inventory, *see infra* § [18.49](#).
 - (3) Deal with spousal elections and family allowances, *see infra* §§ [18.53–.57](#).
 - (4) Prepare income tax returns, *see infra* §§ [18.50–.52](#).
 - (5) Prepare estate account, *see infra* §§ [18.66–.69](#).
 - (6) Prepare estate tax return, if required, *see infra* §§ [18.70–.74](#).
 - (7) Close estate, *see infra* §§ [18.75–.77](#).
2. Hearing on notice
- a. Initial filing
- (1) Draft documents listed in section [18.30](#), para. 2.a.(1), *supra*.
 - (2) E-file papers as follows:
 - (a) Petition for Formal Administration. Form PR-1901.
 - (b) Secure appointment of GAL, if required, or Petition to Dispense with GAL and Order Dispensing with GAL, if required. Form GF-131; Form PR-1821.
 - (c) Obtain signature of court on original Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims. Form PR-1903.
 - (3) After e-filing papers
 - (a) Publish Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims three times (class 3 notice) in the local newspaper, with first insertion within 15 days after date of Order. [Wis. Stat.](#) §§ 859.07, 879.05(4); Form PR-1903.
 - (b) Mail notice to all creditors whose existence can be found by the personal representative using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48.

- (c) Mail copies of Order Setting Time to Hear Petition for Administration and Deadline for Filing Claims to all interested parties at least 20 days before hearing. [Wis. Stat.](#) §§ 851.21, 879.05; Form PR-1903.
 - (d) Give probate claims notice to DHS or DOC and county clerk of legal residence if circumstances require, *see supra* § [18.27](#), para. 1.a.(9). [Wis. Stat.](#) § 859.07; Form F-13033.
 - (e) Draft Affidavit of Service. [Wis. Stat.](#) § 879.07(1); Form PR-1817.
 - (f) Draft following documents:
 - (i) Proof of Heirship. [Wis. Stat.](#) §§ 852.01, 863.23; Form PR-1806.
 - (ii) Order Appointing Guardian ad Litem or Attorney, if required; or Petition to Dispense with GAL and Order Dispensing with GAL, if required. [Wis. Stat.](#) §§ 879.23, 879.25; Form GF-131; Form PR-1821.
 - (iii) Order for Formal Administration. Form PR-1905.
 - (iv) Surety or signature bond, if required. Form PR-1809 or commercial bonds.
 - (v) Domiciliary Letters. [Wis. Stat.](#) § 856.21; Form PR-1810.
 - (vi) Order Appointing Appraisers, if requested by an interested party. [Wis. Stat.](#) § 858.13; Form PR-1907.
 - (g) E-file the above documents with the court in advance of the court hearing.
 - (h) Obtain proof of publication by affidavit from publisher and e-file with court (some newspapers send proof directly to court). [Wis. Stat.](#) §§ 879.07(3), 985.12.
- b. At court hearing
- (1) File a copy of the Order for Administration, Domiciliary Letters, and Order Appointing Appraisers, if requested by an interested party, with the court at the hearing. Form PR-1905; Form PR-1810; Form PR-1907.
 - (2) Take testimony for proof of heirship (follow order of questions in Proof of Heirship). Form PR-1806.
 - (3) Secure court approval of bond, if any required. [Wis. Stat.](#) § 856.25; Form PR-1809.
 - (4) Secure appointment of appraisers, if requested by an interested party.

NOTE: An appraisal is not necessary if the value of the assets is readily ascertainable without the exercise of judgment by an appraiser. [Wis. Stat.](#) § 858.15.

(5) Have court sign Domiciliary Letters; obtain conformed copies and certified copies from probate office, if needed. Form PR-1810.

c. After hearing, follow procedures set forth at para. 1.c., *supra*.

VII. SPECIAL PROCEEDINGS [§ 18.741]

A. Summary Procedures [§ 18.742]

1. May be used to transfer nonmarital and marital property in Wisconsin, regardless of whether decedent died in Wisconsin, if the property is designated to pass by nontestamentary disposition in marital property agreement. [Wis. Stat.](#) §§ 867.046, 766.58(3)(f); Form PR-1928; Form PR-1929.
2. Procedure
 - a. Prepare Petition and Certification and obtain issuance under seal of court.
 - b. File certified copies of certificate with register of deeds for any county where real estate is located.
3. Procedure with marital property agreement is the same as above.

B. Ancillary Probate [§ 18.743]

See [Wis. Stat.](#) ch. 868.

1. Obtain certified copy or the original Appointment of Personal Representative in home state proceedings; file with court in county where the real estate is located.

NOTE: Upon filing, the foreign personal representative has all the powers that a locally appointed personal representative would have and may convey merchantable title to real estate. [Wis. Stat.](#) § 877.16.

C. Special Administration [§ 18.744]

1. May be used when a transfer agent or other entity holding an asset requires administrator to sign a document (*see infra* para. 2.a.).
2. Under [Wis. Stat.](#) § 867.07, grounds for the appointment of special administrator are the following:
 - a. An act needs to be completed on behalf of the decedent and there is no need for an administration.
 - b. The estate has been closed and an act remains to be completed or a new asset has been discovered.

- c. A transfer agent or other entity holding an asset requires an administrator to sign a document in conjunction with a summary settlement, summary assignment, or transfer by affidavit.
 - d. An estate needs to be preserved and protected pending the appointment of a personal representative.
 - e. An administrator is required to handle circumstances under [Wis. Stat.](#) § 867.05(5) and (6) (relating to tax under [Wis. Stat.](#) ch. 72).
 - f. A circumstance exists that the court determines requires the appointment of a special administrator.
3. Procedure
- a. A special administrator may be appointed by the court without notice to interested persons, if it determines that notice is unnecessary or inexpedient, or if appointment should be made without delay. [Wis. Stat.](#) § 867.11.
 - b. If notice of hearing is required, it follows the rules under [Wis. Stat.](#) § 879.03.
 - c. Draft the following documents:
 - (1) Petition for Special Administration. [Wis. Stat.](#) §§ 867.07, 867.09, 879.57; Form PR-1850.
 - (2) Order Setting Time to Hear Petition for Special Administration if a hearing is required. [Wis. Stat.](#) §§ 867.11, 879.03; Form PR-1851.
 - (3) Proof of Heirship (if required). Form PR-1806.
 - (4) Consent to Serve. Form PR-1807.
 - (5) Order for Special Administration. [Wis. Stat.](#) §§ 867.07, 867.17, 879.05, 879.57; Form PR-1852.
 - (6) Letters of Special Administration. [Wis. Stat.](#) §§ 867.15, 867.17, 879.57; Form PR-1853.
 - d. E-file the above documents with the court in advance of the court hearing if a hearing is required.
 - e. If a notice and hearing is required:
 - (1) File Order for Special Administration and Letters of Special Administration. Form PR-1852; Form PR-1853.
 - (2) Take testimony for proof of heirship if required (follow order of questions in Proof of Heirship). Form PR-1806.

- (3) Secure court approval of bond, if any required. [Wis. Stat.](#) § 856.25; Form PR-1809A; Form PR-1809B.
 - (4) Have court sign Order for Special Administration and Letters of Special Administration; obtain conformed copies and certified copies from probate office, if needed. Form PR-1852; Form PR-1853.
- f. If notice is not required:
- (1) File with court documents listed in para. c., *supra*.
 - (2) Have court sign Order for Special Administration and Letters of Special Administration; obtain conformed copies and certified copies from probate office, if needed. Form PR-1852; Form PR-1853.
- g. After the property is transferred or the act is accomplished:
- (1) File Petition for Discharge of Special Administrator with the court advising that the purpose of special administration has been completed. Form PR-1854.
 - (2) Obtain discharge of the special administrator by filing Order Discharging Special Administrator with court. [Wis. Stat.](#) § 867.21; Form PR-1855.

D. Transfer by Affidavit [§ 18.745]

1. Simple procedure to be used only when the *gross value* of all solely owned probate property in Wisconsin does not exceed \$50,000. [Wis. Stat.](#) § 867.03(1g); Transfer by Affidavit Form, <https://www.wisbar.org/forPublic/INeedInformation/Pages/Probate.aspx#affidavit> (last visited May 5, 2022).
2. Can be used to transfer interest in real estate in some situations, *see supra* § 18.15.
3. Must be completed by any heir of decedent, trustee of a revocable trust created by decedent, person named in the will to act as personal representative, or person who was guardian of decedent at time of decedent's death. *Guardian* has the meaning given in [Wis. Stat.](#) § 54.01(10).
4. Procedure. [Wis. Stat.](#) § 867.03.
 - a. The transfer by affidavit form is no longer a state court form. Either draft a transfer by affidavit, in duplicate, or use the form created by the State Bar of Wisconsin, which can be found at Transfer by Affidavit Form, <https://www.wisbar.org/forPublic/INeedInformation/Pages/Probate.aspx#affidavit> (last visited May 5, 2022).
 - b. If decedent or decedent's spouse received services provided as a benefit under a long-term care program as defined in [Wis. Stat.](#) § 49.496(1)(bk), medical assistance under [Wis. Stat.](#) §§ 49.43–499, long-term community-support services funded under [Wis. Stat.](#) § 46.27(7) (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785, notice must be given to DHS by certified mail at least 10 days before heir, or person who was guardian at time of decedent's death, files affidavit (DHS cannot collect if spouse was resident of

nursing home and recipient of medical assistance). [Wis. Stat.](#) § 867.03(1m); *Department of Health & Soc. Servs. v. Budney*, 197 Wis. 2d 948 (Ct. App. 1995).

- c. Present both originals to person holding decedent's property with attached proof of mail delivery if required. [Wis. Stat.](#) § 867.03(1g).
 - d. Upon transfer to heir, trustee, person named in the will to act as personal representative, or the person who was guardian at time of decedent's death and furnishing affidavit, with attached proof of mail delivery, if required, transferor is released as if transfer was made to the personal representative of the estate of decedent. [Wis. Stat.](#) § 867.03(2).
5. Recipients of medical assistance benefits. [Wis. Stat.](#) § 49.849.
- a. DHS may collect, by affidavit from decedent's property, an amount equal to medical assistance benefits recoverable under [Wis. Stat.](#) § 49.496(3)(a), long-term community-support services under [Wis. Stat.](#) § 46.27 (2017–18) that is recoverable under [Wis. Stat.](#) § 46.27(7g)(c)1. (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785 that is recoverable under [Wis. Stat.](#) § 49.682(2)(a) or (am) and that was paid on behalf of the decedent or the decedent's spouse, if the following conditions are met. [Wis. Stat.](#) § 49.849(2); *Budney*, 197 Wis. 2d 948.
 - (1) Decedent died after Sept. 30, 1991, or, for the recovery of aid under [Wis. Stat.](#) § 49.785, the decedent died after July 14, 2015.
 - (2) Decedent is not survived by spouse, child under age 21, or disabled child as defined by [Wis. Stat.](#) § 49.468(1)(a)1. (this subdivision does not apply for the recovery of aid under [Wis. Stat.](#) § 49.785).
 - b. If the conditions in [Wis. Stat.](#) § 49.849(2)(a) are met, DHS has a lien in the amount that it may recover under [Wis. Stat.](#) § 49.849(2)(a) on any interest in decedent's home, as defined by [Wis. Stat.](#) § 49.496(1)(b). DHS may record lien and foreclose as if a mortgage unless any of following is alive: decedent's spouse, decedent's child under age 21, or disabled child as defined in [Wis. Stat.](#) § 49.468(1)(a)1.

NOTE: DHS must reduce the amount of its recovery by up to the amount specified in [Wis. Stat.](#) § 861.33(2) if doing so is necessary to allow heirs or beneficiaries to retain the decedent's wearing apparel and jewelry; furniture, furnishings, and appliances; and other tangible personal property described in [Wis. Stat.](#) § 861.33(1)(a)4.
 - c. Person who, on receipt of affidavit from DHS, pays funds to DHS to reimburse DHS for recoverable benefits is released from liability to decedent's other creditors. [Wis. Stat.](#) § 49.849(3)(b).
 - d. If person has claim that, if the estate were administered, would be entitled to higher priority under [Wis. Stat.](#) § 859.25(1) than DHS would have under [Wis. Stat.](#) § 859.25(1), demand can be made within one year after funds collected for payment. [Wis. Stat.](#) § 49.849(5).

E. Summary Settlement [§ 18.746]

See [Wis. Stat.](#) § 867.01.

1. Summary settlement is rarely used because [Wis. Stat.](#) § 867.03 now provides for use of transfer by affidavit if gross value does not exceed \$50,000.
2. Simplified procedure limited to estates in the following cases:
 - a. Fair market value of estate, minus debts for which any estate property is security, does not exceed \$50,000 net value, and decedent is survived by spouse or domestic partner, minor children, or both. [Wis. Stat.](#) § 867.01(1).
 - b. Value of estate, minus debts for which any estate property is security, does not exceed costs, expenses, allowances, and claims of estate.
3. If decedent or decedent's spouse received services provided as a benefit under a long-term care program as defined in [Wis. Stat.](#) § 49.496(1)(bk), medical assistance under [Wis. Stat.](#) §§ 49.43–.499, long-term community-support services funded under [Wis. Stat.](#) § 46.27(7) (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785, notice must be given to DHS by certified mail as soon as practicable after filing petition with court (DHS cannot collect if spouse was resident of nursing home and recipient of medical assistance). [Wis. Stat.](#) § 867.01(3)(d); *Department of Health & Soc. Servs. v. Budney*, 197 Wis. 2d 948 (Ct. App. 1995).
4. 30 days must have elapsed since notice to DHS before property may be assigned. [Wis. Stat.](#) § 867.01(3)(f).
5. Procedure
 - a. Draft the following documents:
 - (1) Petition for Summary Settlement. [Wis. Stat.](#) § 867.01(3)(am); Form PR-1835.
 - (2) Proof of Heirship. Form PR-1806.
 - (3) Waiver and Consent. Form PR-1846.
 - (4) Summary Settlement: Order and Notice for Hearing on Petition for Summary Settlement. [Wis. Stat.](#) §§ 867.01(3)(am), (d), 879.03; Form PR-1836.

NOTE: Court may hear matter, including Proof of Will, without notice to interested persons, or may order notice given under [Wis. Stat.](#) § 879.03. Form PR-1845.
 - (5) Surety or signature Bond in Estate or Trust Proceedings for petitioner in summary settlement, if required. [Wis. Stat.](#) § 867.01(3)(c); Form PR-1809.
 - (6) Order on Petition for Summary Settlement. [Wis. Stat.](#) § 867.01(3)(f); Form PR-1837.
 - b. Open on waiver.
 - (1) If notice is not required:

- (a) File items listed in para. 5.a., *supra*, with court.
 - (b) Have court sign Order on Petition for Summary Settlement. Form PR-1837.
 - (c) Obtain confirmed copy or certified copy of Order to be used to transfer assets.
- (2) If notice is required. [Wis. Stat.](#) § 867.01(3)(d).
- (a) Publish notice once in local newspaper (class 1 notice) under [Wis. Stat.](#) § 985.07(1).
 - (b) Mail notice to all creditors whose existence can be found by the personal representative using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48.
 - (c) E-file Affidavit of Service and proof of publication, showing compliance with notice requirements. Form PR-1817.
 - (d) E-file documents listed in para. 5.a., *supra*, with court.
 - (e) At hearing:
 - (i) Have court sign Order on Petition for Summary Settlement. Form PR-1837.
 - (ii) Obtain conformed copy or certified copy of Order on Petition for Summary Settlement to be used to transfer assets.

F. Summary Assignment [§ 18.747]

See [Wis. Stat.](#) § 867.02.

NOTE: Summary assignment is rarely used because [Wis. Stat.](#) § 867.03 now provides for transfer by affidavit if gross value does not exceed \$50,000.

1. Fair market value of estate, minus debts for which any estate property is security, does not exceed \$50,000 net value, and the estate cannot be settled using summary settlement. [Wis. Stat.](#) § 867.02(1).
2. If decedent or decedent's spouse received services provided as a benefit under a long-term care program as defined in [Wis. Stat.](#) § 49.496(1)(bk), medical assistance under [Wis. Stat.](#) §§ 49.43–.499, long-term community-support services funded under [Wis. Stat.](#) § 46.27(7) (2017–18), or aid under [Wis. Stat.](#) § 49.68, 49.683, 49.685, or 49.785, notice must be given to DHS by certified mail as soon as practicable after filing petition with court (DHS cannot collect if spouse was resident of nursing home and recipient of medical assistance). [Wis. Stat.](#) § 867.02(2)(am)6., (d); *Department of Health & Soc. Servs. v. Budney*, 197 Wis. 2d 948 (Ct. App. 1995).
3. Procedure
 - a. Draft the following documents:

- (1) Petition for Summary Assignment. [Wis. Stat.](#) § 867.02(2)(am); Form PR-1840.
- (2) Affidavit of Additional Property and/or Creditor for Summary Assignment. [Wis. Stat.](#) § 867.02(2)(am)3., 4.; Form PR-1841.
- (3) Proof of Heirship. Form PR-1806.
- (4) Waiver and Consent. Form PR-1846.
- (5) Order and Notice of Hearing Petition of Summary Assignment. [Wis. Stat.](#) §§ 867.02(2)(am)5., (d), 879.03, 879.05; Form PR-1843.

NOTE: The court may hear the matter, including testimony on the Proof of Will, without notice to interested persons, or the court may order that notice be given under [Wis. Stat.](#) § 879.03.

- (6) Notice to Creditors for Summary Assignment. [Wis. Stat.](#) § 867.02(2)(am)4., 5., (d); Form PR-1842.
 - (7) Notice to DHS.
 - (8) Surety or signature Bond in Estate or Trust Proceedings for petitioner in summary assignment, if required. [Wis. Stat.](#) § 867.02(2)(c); Form PR-1809.
 - (9) Order on Petition for Summary Assignment (obtain conformed copy to be used to transfer assets). [Wis. Stat.](#) § 867.02(2)(g); Form PR-1844.
- b. Open on waiver.
- (1) If notice is not required:
 - (a) E-file with court all documents drafted in para. 3.a., *supra*, *except* Notice to Creditors.
 - (b) E-file and obtain conformed copy of Order and Notice of Hearing Petition of Summary Assignment. Form PR-1843.
 - (c) As soon as practical after filing, give notice by certified mail to DHS.
 - (d) Publish notice once in local newspaper (class 1 notice) under [Wis. Stat.](#) § 985.07(1). [Wis. Stat.](#) § 867.02(2)(d).
 - (e) Have court sign Order on Petition for Summary Assignment; obtain conformed copy or certified copy to be used for transfer of assets. Form PR-1844.
 - (2) If notice is required:
 - (a) E-file Affidavit of Service and proof of publication showing compliance with notice requirements. Form PR-1817.

- (b) Mail notice to all creditors whose existence can be found using reasonable diligence. [Wis. Stat.](#) §§ 859.02(1), (2), 859.48.
- (c) E-file with court all documents drafted in para. 3.a., *supra*, except Notice to Creditors.
- (d) Have court sign Order on Petition for Summary Assignment; obtain conformed copies or certified copies to be used to transfer assets. Form PR-1844.

G. Termination of Joint Tenancy or Life Tenant's Interest in Real Estate (Administrative Transfer) [§ 18.748]

See [Wis. Stat.](#) § 867.045.

- 1. May be used to transfer real property, vendor's interest in land contract, or mortgagee's interest in mortgage.
- 2. Procedure
 - a. Prepare Application for the Termination of Decedent's Interest. [Wis. Stat.](#) § 867.045; Form HT-110 and TOD-110.
 - b. Complete transfer tax return at Wis. Dep't of Revenue, *Real Estate Transfer Fee*, <https://www.revenue.wi.gov/Pages/RETr/Home.aspx> (last visited May 5, 2022).
 - c. File application with register of deeds with certified copy of death record, real estate tax bills for the year immediately preceding year of decedent's death, and legal description of real estate imprinted on or attached to application, with recording fee set by county board.

NOTE: Some registers of deeds do not require the filing of the certified copy of the death record if the death occurred in the county where the real estate is located.

H. Termination of Joint Tenancy (Judicial Transfer) [§ 18.749]

See [Wis. Stat.](#) § 867.04.

- 1. May be used if termination by administrative transfer cannot be used, *see supra* § [18.39](#).
- 2. Procedure
 - a. Draft the following documents:
 - (1) Petition for Termination of Joint Tenancy. Form PR-1926.
 - (2) Certificate of Termination of Joint Tenancy. Form PR-1927.
 - b. E-file the documents listed in para. 2.a., *supra*, with court; obtain conformed copy or certified copy of Certificate of Termination of Joint Tenancy from register in probate.

- c. Record certified copy of Certificate of Termination of Joint Tenancy with register of deeds in each county in this state where real property or interest in real property located; certificate is prima facie evidence of facts recited. [Wis. Stat.](#) § 867.04.

I. Termination of Life Estate (Judicial Transfer) [§ 18.750]

See [Wis. Stat.](#) § 867.04.

1. May be used if termination by administrative transfer cannot be used, *see supra* § [18.39](#).
2. Procedure
 - a. Draft the following documents:
 - (1) Petition for Termination of Life Estate. Form PR-1926.
 - (2) Certificate of Termination of Life Estate. Form PR-1927.
 - b. See sections [18.70–74](#), *infra*, on estate taxes.
 - c. E-file the documents listed in para. 2.a., *supra*, with court; obtain conformed copy or certified copy of Certificate of Termination of Life Estate. Form PR-1927.
 - d. Record certified copy of Certificate of Termination of Life Estate. Form PR-1927.

J. Determination of Descent of Property [§ 18.751]

See [Wis. Stat.](#) § 867.05.

1. Used to clear title if all the following are true:
 - a. Estate proceedings were ignored at time of death.
 - b. More than six years have elapsed since death.
 - c. Decedent died intestate.
2. Procedure
 - a. Before hearing, draft the following documents:
 - (1) Petition for Certificate of Determination of Descent/Judgment Determining Descent. [Wis. Stat.](#) § 867.05(1); Form PR-1945.
 - (2) Order and Notice of Hearing on Petition for Judgment Determining Descent. Form PR-1946.

Court may hear matter without notice to interested persons or may order notice given under [Wis. Stat.](#) § 879.03.

- (3) Proof of Heirship. Form PR-1806.
 - (4) Certificate of Descent, if *not* on notice. [Wis. Stat.](#) § 867.05(2); Form PR-1947.
 - (5) Judgment Determining Descent, if on notice. [Wis. Stat.](#) § 867.05(3); Form PR-1948.
- b. If notice is not required:
- (1) File with court items listed in paras. 2.a.(1)–(4), *supra*.
 - (2) Obtain duplicate original of Certificate of Descent from probate office. Form PR-1947.
- c. If notice is required:
- (1) File Affidavit of Service and proof of publication showing compliance with notice requirements; then file documents listed in paras. 2.a.(1), (2), and (5), *supra*. Form PR-1817.
 - (2) Obtain duplicate original of Judgment Determining Descent from probate office. Form PR-1948.
- d. Record certified copy of either Certificate of Descent (if not on notice) or Judgment Determining Descent (if on notice) with register of deeds in each county in Wisconsin where real property affected by this procedure located. [Wis. Stat.](#) § 867.05(4); Form PR-1947; Form PR-1948.

K. Summary Confirmation of Interest in Property [§ 18.752]

See [Wis. Stat.](#) § 867.046.

1. Under [Wis. Stat.](#) § 867.046(1m), available when
 - a. Domiciliary of Wisconsin who, before death, had interest in property in Wisconsin including interest in survivorship marital property; or
 - b. Person not domiciled in Wisconsin dies with interest in property in Wisconsin, including survivorship marital property.
2. Procedure
 - a. Draft petition to court of decedent's county of domicile or county where property is located.
 - b. Court will issue certificate setting forth the following:
 - (1) Death of decedent,
 - (2) Termination or transfer of decedent's interest in property,

- (3) Petitioner's interest in property, and
- (4) Any other facts necessary to determine rights of persons interested.

NOTE: The certificate is prima facie evidence of the facts recited.

- c. Record certified copy or duplicate original with register of deeds of county where the real estate is located. [Wis. Stat.](#) § 867.046(5).

L. Alternative Proceedings to Confirmation Under [Wis. Stat.](#) § 867.046(1m) [§ 18.753]

1. Available when person who dies has interest in real property, vendor's interest in land contract, interest in savings or checking account, interest in a security, or mortgagee's interest in mortgage, including survivorship marital property. [Wis. Stat.](#) § 867.046(2).
2. Available for spouse, transfer on death (TOD) beneficiary, or beneficiary of marital property agreement to obtain confirmation of petitioner's interest in property.
3. Procedure
 - a. On register of deeds application form, list date of decedent's death and name, residence, and post office addresses of decedent and applicant; and include copy of latest real estate tax bill and legal description of property, in case of real property, or include copy of deed creating interest, in case of joint tenancy, life estate, or TOD beneficiary designation. [Wis. Stat.](#) § 867.046(2)(a), (b), (i), (j).
 - b. Complete information on application, sign, and verify correctness of information. [Wis. Stat.](#) § 867.046(2), (3).

NOTE: The register of deeds will mail or deliver a copy to the circuit court of the decedent's county of residence. The recorded application constitutes prima facie evidence of the facts recited and constitutes termination of the property interest the same as would a court-supervised procedure. [Wis. Stat.](#) § 867.046(4), (5).

M. Third-Party Confirmation If Proceedings Not Commenced Under [Wis. Stat.](#) § 867.046(1m) or (2) [§ 18.754]

Under [Wis. Stat.](#) § 867.046(2m), available if proceedings were not commenced under [Wis. Stat.](#) § 867.046, 863.27, or 865.201 to confirm within 90 days after death; any interested party may petition.

VIII. COLLECTION OF ASSETS AND INVENTORY [§ 18.755]

A. Collection of Assets [§ 18.756]

1. In all types of probate, the personal representative and attorney is required to make a thorough search for all assets subject to administration.
2. Life insurance

- a. Send a copy of the death record and completed claim forms to insurance companies within time limits of policies.
- b. Request IRS Form 712 from companies for federal estate tax return.
3. Casualty, liability, and health insurance
 - a. Review all fire and liability insurance policies; provide for proper endorsement.
 - b. Make claims against health or accident insurance, if applicable.
 - c. Cancel policies not needed; obtain refund for unused portion of prepaid premiums.
4. Prepaid contracts
 - a. Review and cancel all prepaid contracts for magazines, newspapers, etc.
 - b. Obtain refund for unused portion of prepayments.
5. Employment, veteran's, and Social Security benefits
 - a. Determine whether any pension, veteran's, Social Security, or death benefits available.
 - b. Make claims for benefits.
6. Investments
 - a. Review current nonstock investments to determine whether invested at market rate.
 - b. Review stock or other investments without set value.

If beneficiaries do not agree to receive them as part of their share of estate, sell as soon as possible; invest at market rate.
7. Review U.S. savings bonds to determine tax advantages of selling or retaining.
8. Have all abstracts or title policies brought to date to determine exact nature of each title.
9. Determine whether out-of-state real estate or tangible personal property requires ancillary administration, *see supra* §§ [18.13](#), [18.34](#).

B. Classification [§ 18.757]

See [Wis. Stat.](#) §§ 861.01, 861.02, 861.03, 861.04, 861.05; [Wis. Stat.](#) ch. 766.

1. Surviving spouse may make elections concerning augmented deferred marital property, *see infra* § [18.55](#).

2. Personal representative must classify all marital and nonmarital property within six months after appointment. [Wis. Stat.](#) § 858.01.
3. Proper classification is important not only to determine heirship but also to determine which assets are available to pay claims and priority and payment of claims. [Wis. Stat.](#) § 859.18.
4. Personal representative may petition for court order classifying assets. [Wis. Stat.](#) § 857.01.
5. For details on classification, see Linda Roberson & Howard S. Erlanger, *The Marital Property Classification Handbook* (State Bar of Wis. 4th ed. 2017) and Christine Rew Barden et al., *Marital Property Law & Practice in Wisconsin* chs. 2 and 3 (5th ed. 2019).

C. Inventory [§ 18.758]

See [Wis. Stat.](#) ch. 858.

1. An appraisal is not necessary if the value of the assets is readily ascertainable without the exercise of judgment by an appraiser. [Wis. Stat.](#) §§ 858.13, 858.15.
 - a. If appraisal is required, submit property or description of property to appraisers for valuation.
 - b. Have appraisers sign appraisal, verifying valuations.
2. When inventory is complete, if formal probate, file with court; if informal probate, either file with court or exhibit inventory with probate registrar. Inventory to include only property subject to administration. [Wis. Stat.](#) §§ 858.01, 858.07, 865.11; Form PR-1811.
3. Inventory must be filed or exhibited within six months after the date of the personal representative's appointment unless court has changed time. [Wis. Stat.](#) § 858.01.
4. Payment of an inventory filing fee, calculated on the value of property subject to administration, minus encumbrances, liens, or charges, is due at time of filing inventory or other documents setting forth value of estate. The fee is \$20 if the value is \$10,000 or less or 0.2% if the value is more than \$10,000. [Wis. Stat.](#) § 814.66.
5. Within five days after filing inventory, have personal representative give notice to all interested persons that the inventory has been filed, except beneficiaries of monetary bequest or bequest of specific property, unless there has been waiver of the right to receive inventory. Minors and individuals adjudicated incompetent cannot waive. [Wis. Stat.](#) §§ 858.03, 879.26; Form PR-1908.
6. Take special care to avoid conflicts of interest if spouse is personal representative and can classify assets of other heirs or if heir is personal representative and can classify assets at expense of spouse.

IX. INCOME TAXES [§ 18.759]

A. In General [§ 18.760]

1. Personal representative is responsible for filing decedent's final income tax returns.
2. If income exceeds amount required for filing as set forth by IRS and DOR, federal fiduciary return and Wisconsin fiduciary return must be filed. IRS Form 1041; Wis. DOR Form 2.
3. If estate grosses \$600 or more, mail federal Form 1041 to Department of the Treasury, Internal Revenue Service, Cincinnati, OH 45999-0048 (if no check is enclosed) or 45999-0148 (if a check is enclosed); and Wisconsin Form 2 to Wisconsin Department of Revenue, P.O. Box 8918, Madison, WI 53708-8918 if check is enclosed or if submitting Schedule CC. All other estates, mail to Wisconsin Department of Revenue, P.O. Box 8955, Madison, WI 53708-8955.

NOTE: Form Schedule CC is titled "Request for a Closing Certificate for Fiduciaries." This form must be used when requesting a closing certificate from DOR.

NOTE: There are significant opportunities for tax planning in the selection of a fiscal year and in the timing of receipts and disbursements.

B. Procedure [§ 18.761]

1. File Notice Concerning Fiduciary Relationship with local district director of Internal Revenue. I.R.C. § 6903; Treas. Reg. § 301.6903-1; IRS Form 56.
2. Prepare decedent's personal income tax returns for period from beginning of taxable year to date of death. IRS Form 1040; Wis. Form 2.
3. File IRS Form SS-4 to obtain federal employer identification number (EIN). I.R.C. § 6109.
4. Prepare fiduciary returns for estate from date of death until termination of estate. IRS Form 1041; Wis. Form 2.
 - a. If estate is open more than one year or if short fiscal year is chosen, more than one fiduciary return must be prepared.
 - b. Last return should be titled "Final Return."
5. File Schedule CC, request Closing Certificate for Fiduciaries from DOR, and include copy of inventory and will including any codicils (must file Closing Certificate for Fiduciaries with court for court to approve final account or discharge personal representative, unless it is "clearly evident" to court that no income tax is due or is to become due; prepare petition setting forth facts and order). [Wis. Stat.](#) § 71.13(2), (3).
6. Complete federal schedule K1 and Wisconsin schedule 2K-1 to advise beneficiary of his or her share of income, deductions, credits, or other items of fiduciary that may affect beneficiary's tax liability.
7. After personal representative is discharged, send IRS a notice of termination of fiduciary relationship. I.R.C. § 6903; Treas. Reg. § 301.6903-1; IRS Form 56.

X. FAMILY AND MARITAL RIGHTS [§ 18.762]

A. Marital Property [§ 18.763]

[Wis. Stat.](#) § 861.01 provides that surviving spouse owns an undivided one-half of all marital property at death, which is not subject to administration.

NOTE: Wisconsin's Marital Property Act applies to married same-sex couples.

B. Augmented Deferred Marital Property [§ 18.764]

See [Wis. Stat.](#) §§ 861.018–.11.

1. Surviving spouse may elect one-half of augmented deferred marital property. [Wis. Stat.](#) § 861.02.
 - a. Failure to elect is neither transfer of property nor gift. [Wis. Stat.](#) § 861.10(3).
 - b. If decedent dies intestate and is survived by children who are not also the surviving spouse's children, surviving spouse receives one-half of decedent's property other than marital property; children receive what spouse does not. [Wis. Stat.](#) § 852.01(1)(a), (b).
2. Election must be made in writing, within six months after death, to personal representative setting forth property in which spouse elects to claim one-half. [Wis. Stat.](#) § 861.08.
3. Persons liable must make prorated contributions toward the satisfaction of surviving spouse's deferred-marital-property election share. [Wis. Stat.](#) § 861.07(2).
4. Surviving spouse must be living for election to be filed; election can be made by spouse's conservator, guardian, GAL, or power of attorney. [Wis. Stat.](#) § 861.09.

C. Transfers in Fraud of Marital Property [§ 18.765]

1. Court can declare transfers in fraud under [Wis. Stat.](#) chs. 852 and 861, subject to rights of surviving spouse. [Wis. Stat.](#) § 861.17(1).
2. Not fraud if the transfer is to provide for issue of prior marriage before or within decedent's first year of marriage to surviving spouse. [Wis. Stat.](#) § 861.17(2).
3. Recovery limited to amounts spouse entitled to under statute. [Wis. Stat.](#) chs. 852, 861; [Wis. Stat.](#) § 861.17(3), (3m).
4. Surviving spouse has no rights against innocent parties. [Wis. Stat.](#) § 861.17(4).
5. Suit must be brought within three years and can be barred earlier by laches. [Wis. Stat.](#) § 861.17(5).

D. Family Allowances [§ 18.766]

1. Surviving spouse has same right of election against will (or right of succession if no will) to take share of nondomiciliary decedent's Wisconsin real property as if the property were located in decedent's state of domicile at death. [Wis. Stat.](#) § 861.20.

2. Court may, with or without notice, order an allowance necessary for support of surviving spouse or surviving domestic partner and minor children after considering size of estate, standard of living, and other relevant factors. [Wis. Stat.](#) § 861.31(1m).
 - a. Initial order may not exceed one year but can be extended or revised. [Wis. Stat.](#) § 861.31(3).
 - b. Allowance can be charged against income or principal, as an advance or otherwise, but not against surviving spouse's interest. [Wis. Stat.](#) § 861.31(4).
 - c. Surviving spouse's allowance can be applied against spouse's right to elect augmented deferred marital property. [Wis. Stat.](#) § 861.31(4).
3. Selection of personal property. [Wis. Stat.](#) § 861.33(1)(a).
 - a. Surviving spouse or surviving domestic partner may file with the court written selection of following property, which personal representative will transfer to surviving spouse or minor children:
 - (1) Decedent's and surviving spouse's or surviving domestic partner's clothing and personal jewelry. [Wis. Stat.](#) § 861.33(1)(a)1.
 - (2) Automobile. [Wis. Stat.](#) § 861.33(1)(a)2.
 - (3) Household furniture, furnishings, and appliances. [Wis. Stat.](#) § 861.33(1)(a)3.
 - (4) Other tangible personal property not to exceed \$3,000 in value. [Wis. Stat.](#) § 861.33(1)(a)4.
 - b. Selection may be limited; trustee may be appointed. [Wis. Stat.](#) §§ 861.33(1)(b), (2), (3), 861.35(2).
4. Special allowance for support and education. [Wis. Stat.](#) § 861.35.
 - a. Court may order for support of surviving spouse or surviving domestic partner and dependent children.
 - b. None allowed if amply provided for by will or other means. [Wis. Stat.](#) § 861.35(1m)(a), (b), or (c).
 - c. Court may continue jurisdiction over funds or place them in trust. [Wis. Stat.](#) § 861.35(2).
 - d. Factors outlined in [Wis. Stat.](#) § 861.35(3).
5. Exemption from creditors for surviving spouse or surviving domestic partner. [Wis. Stat.](#) § 861.41.

- a. Surviving spouse or surviving domestic partner may petition court to exempt from creditors an amount of property up to \$10,000 in value for spouse's or domestic partner's support if estate assets are insufficient. [Wis. Stat.](#) § 861.41(1).
 - b. Court must grant exemption if necessary but must take into consideration other resources available to spouse or domestic partner. [Wis. Stat.](#) § 861.41(2).
6. Assignment of home to surviving spouse or surviving domestic partner. [Wis. Stat.](#) § 861.21.
- a. Decedent's interest in home may be assigned to surviving spouse or surviving domestic partner if petition is filed requesting assignment within six months and if governing instrument does not provide specific transfer to someone else. [Wis. Stat.](#) § 861.21(2).
 - b. If specific transfer is to other than surviving spouse or surviving domestic partner, court will assign home to surviving spouse or surviving domestic partner upon payment of value of decedent's interest within one year after decedent's death. Court may extend time. [Wis. Stat.](#) § 861.21(4).
 - c. To enable transfer, home may be severed from surrounding land; as much land as is necessary for a dwelling may be assigned. [Wis. Stat.](#) § 861.21(5).

XI. CREDITORS' RIGHTS [§ 18.767]

A. Must File Claim [§ 18.768]

See [Wis. Stat.](#) §§ 859.01, 859.02.

1. Requirements
 - a. In writing and sworn. [Wis. Stat.](#) § 859.13(1).
 - b. Must detail nature of claim (e.g., "\$500 owed for radiological services provided on October 2, 2020").
 - c. If debt is in writing, a copy must be filed. [Wis. Stat.](#) § 859.13(2).
 - d. Must classify claim if marital property is involved. [Wis. Stat.](#) § 859.18.
2. Person interested may request a statement of all claims. [Wis. Stat.](#) § 859.29.
3. Under certain circumstances, creditors may make claim within one year after decedent's death and within 30 days after the earlier of the following:
 - a. Date that personal representative gives notice to creditor of deadline for filing claims and of court in which estate is administered. [Wis. Stat.](#) § 859.48(2)(a).
 - b. Date that creditor has actual notice of estate's administration and of court in which estate is administered. [Wis. Stat.](#) § 859.48(2)(b).

4. Creditor must serve copy of claim on personal representative or attorney for estate within 10 days after filing claim. [Wis. Stat.](#) § 859.48(3).

B. Personal Representative's Immunity [§ 18.769]

See [Wis. Stat.](#) § 857.31.

Personal representative incurs no liability as a result of any of the following:

1. Giving notice to potential claimant on pendency of estate administration proceedings, court in which proceeding is pending, or deadline for filing claim against estate under [Wis. Stat.](#) § 859.01 or 859.48.
2. Not giving notice to potential claimant on pendency of estate administration proceedings, court in which proceeding is pending, or deadline for filing claim against estate under [Wis. Stat.](#) § 859.01 or 859.48, even if personal representative knew, or in exercise of reasonable diligence should have known, of existence of potential claims.
3. Not informing distributees of their potential liability for claims not barred by [Wis. Stat.](#) § 859.02(2)(b).

C. Priority of Payment [§ 18.770]

See [Wis. Stat.](#) § 859.25.

1. Costs and expenses of administration
2. Reasonable funeral expenses
3. Family allowances, except under [Wis. Stat.](#) § 861.41
4. Last illness
5. Governmental debts
6. Wages, of up to \$300 per employee, incurred within three months after decedent's death
7. [Wis. Stat.](#) § 861.41 allowance
8. All other allowed claims

D. Marital Property Claims [§ 18.771]

See [Wis. Stat.](#) § 859.18.

1. Marital property rules prevail.
2. Marital property agreements do not affect [Wis. Stat.](#) § 859.18 unless property at issue was unavailable to creditor under agreement while both spouses were alive. [Wis. Stat.](#) § 859.18(6).

E. Secured Claims [§ 18.772]

1. Claim must describe security. [Wis. Stat.](#) § 859.19(1).
2. Creditor may do either of the following:
 - a. Surrender security and receive the full amount of claim. [Wis. Stat.](#) § 859.19(2)(a).
 - b. Realize fair value for security and claim deficiency. [Wis. Stat.](#) § 859.19(2)(b).

F. Contingent Claims [§ 18.773]

1. Must be filed. [Wis. Stat.](#) § 859.21.
2. Personal representative and creditor may place value on and pay claim. [Wis. Stat.](#) § 859.21(1).
3. Court may do any of following. [Wis. Stat.](#) § 859.21(2)–(4).
 - a. Withhold funds.
 - b. Distribute to heirs subject to claim with or without bond.
 - c. Do what court deems proper.

G. Tort Claims [§ 18.774]

See [Wis. Stat.](#) § 859.45.

1. May be filed as any other claim in probate proceeding and receive probate court protection (assets of deceased cannot be distributed from estate until creditors, including tort claims, are paid).
2. Suit may be started outside of probate court as in any other action.

XII. ESTATE ACCOUNT AND PETITION PROCEDURE (FORMAL PROBATE ONLY) [§ 18.775]**A. Personal Representative's Responsibilities [§ 18.776]**

Have personal representative prepare and file Estate Account and Petition for Final Judgment. See [Wis. Stat.](#) §§ 862.01(1), 862.07, 863.25; Form PR-1814; Form PR-1910.

B. Hearing [§ 18.777]

Set date for hearing (unless notice of final hearing waived, Estate Account must be on file at least three weeks before date set for final hearing). See Form PR-1910.

C. Notice [§ 18.778]

Do one of the following:

1. Secure Waiver, Consent and Approval from all interested persons. [Wis. Stat.](#) § 879.09; Form PR-1902.
2. Have court enter Order and Notice for Hearing on Petition for Final Judgment. [Wis. Stat.](#) § 862.09; Form PR-1911.
 - a. Mail or personally serve Order and Notice of Hearing on Petition for Final Judgment to or on interested persons. Form PR-1911.
 - b. If court requires or if address of any interested persons unknown, publish three times. [Wis. Stat.](#) §§ 879.03, 879.05(4).

XIII. ESTATE TAXES [§ 18.779]

A. In General [§ 18.780]

Wisconsin Estate Tax Handbook and *Eckhardt's Workbook for Wisconsin Estate Planners* are excellent resources. See *supra* § [18.3](#).

B. Federal Estate Tax [§ 18.781]

1. File federal estate tax return if total assets, including taxable lifetime gifts, exceeded \$5.49 million in 2017. Under the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017), the amount is \$11.2 million in 2018, \$11.4 million in 2019, \$11.58 million in 2020, \$11.7 million in 2021, and \$12.06 million in 2022. This amount will be adjusted for inflation each year until 2025. On January 1, 2026, the amount is scheduled to revert to the 2017 level, adjusted for inflation. I.R.C. § 2010.
2. Tax rate is 40% in 2013 and future years; it was not changed by the federal tax reform laws of 2010 or 2012. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 302(a)(2), 124 Stat. 3296 [hereinafter 2010 Tax Relief Act]; American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101(c), 126 Stat. 2313 [hereinafter 2012 Tax Relief Act].
3. For deaths that occur in or after 2011, applicable exclusion amount is increased by deceased spouse's unused exclusion, adjusted for inflation. Timely estate tax return must be filed to claim amount, even if return not required for other reasons. 2010 Tax Relief Act § 303; 2012 Tax Relief Act § 101.
4. Deceased spouse's unused exclusion amount is lesser of (a) basic exclusion amount; or (b) excess of basic exclusion amount of last such deceased spouse of such surviving spouse over amount with respect to which tentative tax is determined under I.R.C. § 2001(b)(1) on the estate of the deceased spouse. Election is made by timely filing deceased spouse's estate tax return.
5. Tax due within nine months after date of death unless extension of time for payment has been granted, proper election for installment payments has been made, or proper election to postpone part of tax attributable to reversionary or remainder interest has been made.

6. Timely mailing of return proved by showing receipt for certified or registered mail or a private delivery service (with proper sender's receipt).
7. Application for extension must be made before end of usual filing period.

C. Wisconsin Estate Tax [§ 18.782]

There is no Wisconsin estate tax. [Wis. Stat.](#) §§ 72.02, 72.01(11m).

D. Wisconsin Fiduciary Income Tax [§ 18.783]

If it is clear from documents filed that filing fiduciary return is not required, court may waive filing of fiduciary return and closing certificate for fiduciaries.

XIV. CLOSING THE ESTATE [§ 18.784]

A. In General [§ 18.785]

Some procedures apply only to formal probate and some only to informal probate, as noted below.

B. Procedure [§ 18.786]

1. Obtain from DOR a Closing Certificate for Fiduciaries by mailing to the department the following:
 - a. Fiduciary Income Tax Return(s), with completed Schedule CC;
 - b. Copy of Inventory; and
 - c. Copy of Will, if there is one.
2. After obtaining closing certificate, have personal representative file following with court:
 - a. Proof of publication, if applicable.
 - b. Order and Notice for Hearing on Petition for Final Judgment or Waiver, Consent and Approval regarding the right to receive notice of the final judgment (formal probate only).
3. After (for formal probate only) court enters Final Judgment, which should terminate joint tenancy, terminate life estate, and vest survivorship marital property, record certified copy or duplicate original with register of deeds.

NOTE: An Abridgment of Final Judgment may be obtained for recording purposes.

4. Have personal representative distribute estate in accordance with final judgment and secure Estate Receipts from beneficiaries and claimants. Form PR-1815.

5. After filing receipts, secure Order Discharging Personal Representative (formal probate). Form PR-1915.
6. Informal probate
 - a. If joint property, life estate, or survivorship marital property, have personal representative sign Statement Terminating Joint Tenancy, Terminating Life Estate, or Vesting Survivorship Marital Property, and record certified copy or duplicate original with register of deeds.
 - b. File Statement of Personal Representative to Close Estate. Form PR-1816.

Chapter 19

Guardianship, Conservatorship, and Durable Power of Attorney

Eve Dennison Pollock

W.R. Stewart & Associates, S.C.
Madison

Avery J. Mayne

Walny Legal Group LLC
Milwaukee

NOTE: Procedures for the topics covered in this chapter vary from county to county. This chapter is intended only as a guide and reference to statutory provisions; it does not serve as a substitute for checking appropriate statutes, statutory history, relevant federal and state case law, and local practice. It also may be wise to check with the register in probate in the county of jurisdiction. Courts mandate the use of certain standard forms. *See* Wis. Ct. Sys., *Circuit Court Forms: Guardianship – All*, https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&FormNumber=&beg_date=&end_date=&StateCite=&Category=17&SubCat=All (last updated Feb. 13, 2022).

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2022, No. 796; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-127 (May 16, 2022); and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Apr. 26, 2022.

I. INTRODUCTION [§ 19.787]

A. In General [§ 19.788]

1. Guardianship is a procedure in which court appoints guardian to manage the income and assets (which may include digital property by court order) and provide for the essential requirements for health, safety, and personal needs of a minor, a person found incompetent (an individual who has been adjudicated by a court to meet the requirements of [Wis. Stat. § 54.10\(3\)](#)), or a spendthrift person. [Wis. Stat. § 54.01\(10\)](#), (16).
2. Conservatorship is a procedure by which a competent adult who believes himself or herself unable to properly manage own affairs voluntarily applies to the court to have another person, a conservator, appointed to manage financial affairs. [Wis. Stat. §§ 54.01\(3\)](#), 54.76(1). A conservator has same powers and duties as guardian of estate as described in [Wis. Stat. §§ 54.19–20](#). [Wis. Stat. § 54.76\(3\)](#).
3. Durable power of attorney is a written document executed by the principal that grants authority to agent to act in place of principal and contains language stating principal’s intent that authority conferred to agent will be exercisable notwithstanding principal’s later disability or incapacity. [Wis. Stat. § 244.02\(3\)](#), (9).
4. Durable power of attorney remains in effect after appointment of guardian or conservator unless court limits, suspends, or terminates agent; agent is accountable to court-appointed fiduciary. [Wis. Stat. § 244.08\(2\)](#).
5. Power of attorney for health care remains in effect after appointment of guardian of person unless court revokes or invalidates the power of attorney instrument or limits the authority of the agent. [Wis. Stat. § 155.60\(2\)](#).
6. Person may nominate his or her guardian of the estate or person (or conservator) for consideration by the court if formal proceedings regarding the principal’s estate or person are begun after the principal executes the power of attorney. [Wis. Stat. § 244.08\(1\)](#).
7. Supported decision-making agreement may be executed by a person with a functional impairment to allow another adult to assist in making life decisions. [Wis. Stat. § 52.01\(6\)–\(7\)](#). The existence of such an agreement before a guardianship may not be used as evidence of incapacity or incompetency in the event of a guardianship. [Wis. Stat. § 52.03](#).
8. Court may appoint guardian of person or estate or both. [Wis. Stat. §§ 48.9795](#), 48.977, 48.831 (guardian of person for minor); [Wis. Stat. § 54.10\(1\)](#) (guardian of estate for minor); [Wis. Stat. § 54.10\(3\)](#) (guardian for individual determined to be incompetent).

NOTE: Courts consider appointment of co-guardians with caution because of potential conflicts. Generally, the court limits the appointment of co-guardians to matters in which the nominated guardians are the married parents for a minor child or adult determined to be incompetent.

B. Types of Guardianship [§ 19.789]

1. Guardian of person
 - a. Endeavors to secure necessary care, services, and safety for the ward. [Wis. Stat. § 54.25\(1\)\(b\)](#).

- b. Guardianship of person may be limited to provide for the ward's needs in the manner that constitutes the least restrictive form of intervention. *See* [Wis. Stat.](#) §§ 54.18(1), 54.10(3)(e), 54.25(2).
 - (1) Appointment of limited guardian has no bearing on ward's legal rights specified in [Wis. Stat.](#) § 54.25(2)(c) except upon court's specific findings based on clear and convincing evidence of need for limitations.
 - (2) Continues in effect until either ward establishes he or she has regained competency to manage own care and supportive services without assistance or ward dies. [Wis. Stat.](#) § 54.64(3)(a), (e).
 - c. Court will appoint the agent under the individual's power of attorney for health care as guardian unless the court finds the appointment is not in ward's best interests. [Wis. Stat.](#) § 54.15(3).
2. Guardian of estate
- a. Manages all income and assets for the ward. [Wis. Stat.](#) § 54.19.
 - b. Guardianship of estate for incompetent or spendthrift person may be limited by finding of limited incompetency. [Wis. Stat.](#) § 54.18(1).
 - (1) Continues in effect until ward establishes he or she has regained competency to personally manage affairs without supervision, ward dies, or size of guardianship estate no longer necessitates formal guardianship of estate. [Wis. Stat.](#) § 54.64(4)(a), (e), (5).
 - (2) Court order must specify amount of bond for guardian of estate; court can waive amount in certain cases. [Wis. Stat.](#) § 54.46(4).
 - c. Court will appoint the agent under the proposed ward's durable power of attorney as guardian unless the court find the appointment is not in ward's best interests. [Wis. Stat.](#) § 54.15(2).

C. Resources [§ 19.790]

1. Div. of Long Term Care, Wis. Dep't of Health Servs., *Guardianship of Adults* (June 2011), <https://www.dhs.wisconsin.gov/publications/p2/p20460.pdf>.
2. State Bar of Wis., *Understanding Guardianships: A Handbook for Guardians* (11th ed. 2014).

PRACTICE TIP: Many attorneys order this booklet in bulk (the State Bar of Wisconsin offers booklets in packs of 25, <https://marketplace.wisbar.org/store/gc0078a-understanding-guardianships-a-handbookpack-of-25/c-25/p-17500#17500>) to pass out to their clients who have been recently appointed guardians. This is both to offer clients a resource to refer to while they are serving as guardian and also for attorneys to shield themselves from clients' claims that the attorney did not provide education regarding the guardians' statutory duties and responsibilities to their wards.

3. P. Resch & D. Bennett, *Misunderstanding POAs: Advocating for Client's Statutory Autonomy*, Wis. Law., Feb. 2020, at 42, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=2&ArticleID=27462>; M. Johnson, *You're Not the Boss of Me: Principal's Autonomy Under a POA*, Wis. Law., Feb. 2020, at 49, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=2&ArticleID=27463>; S. Collins, C. Hatch & J. Wilcox, *Offering Clarity and Guidance: New Uniform Power of Attorney for Finances and Property*, Wis. Law., June 2010, at 10.

PRACTICE TIP: Many registers in probate provide hardcopy or online materials to help guardians understand their duties, roles, and annual obligations to the court. While these materials are designed for self-represented litigants, the materials can be passed out from attorney to client at the end of a matter. See, e.g., Guardianship Support Ctr. of the Greater Wisconsin Agency on Aging Res., Inc., *Guardian of the Estate: Duties and Powers*, <https://gwaar.org/api/cms/viewFile/id/2004362> (updated Sept. 2016) (used in Milwaukee County).

II. APPOINTMENT AND COMPENSATION OF GUARDIAN [§ 19.791]

A. Eligible Guardians [§ 19.792]

1. Selection of guardian
 - a. No one has a legal right to serve as guardian; rather, appointment as guardian is conferred upon an individual chosen by the court based on what is in the ward's best interests. *Winnebago Cnty. Dep't of Soc. Servs. v. Harold W. (In re Guardianship of Tina Marie W.)*, 215 Wis. 2d 523, 528 n.1 (Ct. App. 1997).
 - b. Family member, friend, or any individual willing and capable of undertaking responsibility as determined by court
 - (1) Opinions of proposed ward, parents, and family members will be considered, but best interest of ward governs. Wis. Stat. § 54.15(1), (5); see *Brezinski v. Harkholtz (In re Guardianship of Schmidt)*, 71 Wis. 2d 317 (1976); *Anna S. v. Diana M. (In re Guardianship of Keisha M.S.)*, 270 Wis. 2d 411, 414 (Ct. App. 2004).
 - (2) Court's failure to appoint a family member is not an erroneous exercise of discretion if there is evidence that the individual does not have business experience and his or her knowledge of business affairs is limited to a commercial course in high school. *Devereaux v. Hahn (In re Guardianship of Devereaux)*, 237 Wis. 375 (1941).
 - (3) Although family member was nominated under durable power of attorney, court instead appointed corporate guardian, because of severe family conflicts. *Charles N. v. Anderson (In re Guardianship of William N.)*, No. 2009AP625, 2010 WL 1541693 (Wis. Ct. App. Apr. 20, 2010) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).
 - c. Bank
 - (1) Can be guardian of estate.

- (2) By custom, not appointed guardian of person.
- d. Nonprofit corporation or unincorporated association (commonly referred to as “corporate guardian”) if no suitable individual is available and court finds corporation or association is suitable to perform services. [Wis. Stat.](#) § 54.15(7).
 - (1) May be guardian of person, estate, or both.
 - (2) To serve as guardian, must be
 - (a) Organized under [Wis. Stat.](#) ch. 181, 187, or 188; and
 - (b) Approved by Department of Health Services (DHS) under rules established under [Wis. Admin. Code](#) ch. DHS 85.
 - (3) Appointed only if no suitable individual available; statutory preference of parent to serve as guardian is subject to circuit court’s responsibility to determine that best interests of ward are served. [Wis. Stat.](#) § 54.15(5), (7); *Winnebago Cnty. Dep’t of Soc. Servs. v. Harold W. (In re Guardianship of Tina Marie W.)*, 215 Wis. 2d 523, 528 n.1 (Ct. App. 1997); see *Margaret B. v. Milwaukee Cnty. (In re Guardianship of Aaron B.)*, Nos. 2009AP2450, 2010AP1588, 2011 WL 4809825 (Wis. Ct. App. Oct. 12, 2011) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
 - (4) See Div. of Quality Assurance, Wis. DHS, *Corporate Guardianship Directory by County* (Apr. 27, 2021), <https://www.dhs.wisconsin.gov/regulations/guardianship/corp-guard-name.pdf>.
- e. Attorney
 - (1) Like the use of corporate guardians in situations in which no suitable family member or other individual with whom ward is familiar is available to serve, courts have started appointing attorneys to serve as guardians.
 - (2) Use of attorney guardians has increased with increased prevalence of elder abuse.
 - (3) Attorney guardian is often brought in to serve (a) when there is large, complex estate to be managed; or (b) as successor guardian when initially appointed guardian has not properly accounted for the ward’s finances and there are concerns of mismanagement of the ward’s finances.

PRACTICE TIP: Attorneys considering adding fiduciary appointments to their practice should confirm with their malpractice insurance that this is included in current coverage.

2. Special considerations

- a. Other than corporate and attorney guardian, guardian cannot *concurrently* be guardian of person for more than five adult wards unrelated to himself or herself, except by waiver of this expressed limitation by the court for good reason. [Wis. Stat.](#) § 54.15(9).

- b. Under [Wis. Stat.](#) § 54.15(1m), court will consider potential conflicts of interest, including the following:
- (1) Prospective guardian's employment;
 - (2) Claims against ward;
 - (3) Joint holdings with ward;
 - (4) Receipt of ward's assets as transfers or indebtedness to ward;
 - (5) Need for accounting by proposed guardian of prior dealings involving ward; and
 - (6) Prospective guardian's willingness to cooperate with discovery. *George M.S. v. Hida (In re Guardianship of Ethel K.)*, No. 2004AP1506, 2005 WL 3536136 (Wis. Ct. App. Dec. 28, 2005) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
- c. [Wis. Stat.](#) § 54.15(8) states that at least 96 hours before hearing under [Wis. Stat.](#) § 54.44, proposed guardian must submit a sworn statement, including explanation, as to whether any of the following is true:
- (1) Proposed guardian has ever been charged with crime.
 - (2) Proposed guardian has filed bankruptcy.
 - (3) Proposed guardian's professional or occupational license is suspended.
 - (4) Proposed guardian is listed under [Wis. Stat.](#) § 146.40(4g)(a)2.
- d. Under legislation enacted in 2021, any individual proposed to serve as guardian must complete statutory training before appointment. 2021 Wis. Act. 97 (amending [Wis. Stat.](#) § 54.15(8) and creating [Wis. Stat.](#) § 54.26).

CAUTION: Although 2021 Wis. Act 97 made guardianship training a pre-appointment requirement, no formal training has been developed or endorsed by the appropriate departments to date. The departments plan to develop trainings in 2022.

B. Venue [§ 19.793]

1. If proposed ward is resident of Wisconsin, [Wis. Stat.](#) § 54.30(2) provides that venue is in
 - a. Circuit court of county of residence, or
 - b. Circuit court of county in which person is physically present.
2. If proposed ward is nonresident of Wisconsin, venue is in circuit court of any county where proposed ward or any property of proposed ward may be found or the county in which the petitioner alleges that the proposed ward intends to reside; jurisdiction cannot constitutionally be denied to an out-of-state resident found in county and intending to stay. [Wis. Stat.](#)

§ 54.30(2); *Grant Cnty. Dep't of Soc. Servs. v. Unified Bd. (In re Guardianship of Jane E.P.)*, 2004 WI App 153, 275 Wis. 2d 680, *vacated and remanded*, 2005 WI 106, 283 Wis. 2d 258.

NOTE: In *Jane E.P.*, the supreme court set forth standards for the transfer of interstate guardianships and then vacated the decision of the court of appeals and remanded the case to Grant County. These standards are now codified under [Wis. Stat.](#) §§ 53.31 and 53.32.

NOTE: In 2017, Wisconsin adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) to resolve conflicts regarding jurisdiction between states and make uniform the laws with regard to guardianship and protective placement and protective services. 2017 Wis. Act 187; *see infra* §§ [19.104–.111](#) (discussion of [Wis. Stat.](#) ch. 53).

3. Change of venue

Court in which petition is first filed determines venue. [Wis. Stat.](#) § 54.30(3)(a).

- a. If court determines venue is in other county, court must certify record to proper court.
- b. If satisfied of earlier filing in another court, court in which later petition is filed must summarily dismiss second petition.

NOTE: A change of venue may only take place within the state where the guardianship is established. If the ward moves to another state, a new procedure must be started, and if a ward under guardianship moves to Wisconsin from another state, a new petition must be filed. *See infra* §§ [19.104–.111](#) (discussion of [Wis. Stat.](#) ch. 53).

4. If ward moves from county of appointment to another county within state, then, under [Wis. Stat.](#) § 54.30(3)(b),

- a. Venue may be transferred to ward's new county of residence under procedure described in [Wis. Stat.](#) § 54.30(3)(b);
- b. Court for county of ward's residence may approve new guardian; and
- c. On verified petition of new guardian with copy of appointment papers to bank, original court may order original guardianship account settled and delivered to new guardian.

NOTE: A county is not barred, either by [Wis. Stat.](#) § 51.40(2) or by claim preclusion, from relitigating the place of residence of a protectively placed ward when the guardian has moved to another county and located the ward in a community-based residential facility (CBRF) in that other county. *Juneau Cnty. v. Sauk Cnty. (In re Guardianship & Protective Placement of Jeffrey D.)*, 217 Wis. 2d 705 (Ct. App. 1998); *see also Waukesha Cnty. v. Dodge Cnty. (In re Guardianship & Mental Commitment of Jason M.H.)*, No. 00-2754, 2001 WL 1426723 (Wis. Ct. App. Nov. 15, 2001) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

5. Guardian cannot remove ward and transfer out of jurisdiction to another state without prior court approval. *Linda L. v. Collis (In re Guardianship & Protective Placement of Catherine P.)*, 2006 WI App 105, ¶ 56, 294 Wis. 2d 637.

6. Principle of priority: When two states have concurrent jurisdiction, general rule is that state in which proceedings were commenced earlier has priority unless the court has basis to determine that special circumstances exist. *Bogert v. Morrison (In re Guardianship of Morrison)*, 972 So. 2d 905 (Fla. Dist. Ct. App. 2007).

C. Petition for Guardianship [§ 19.794]

1. Who may file

- a. Subject to [Wis. Stat.](#) ch. 54, any person may petition for guardianship of an adult who is alleged to be incompetent or a spendthrift person. [Wis. Stat.](#) § 54.34(1).
- b. Petition for guardianship of minor believed to be in need of protection or services because he or she is without a living parent may be made by (1) DHS, (2) a county department, (3) a child-welfare agency, (4) relative or family member or a person with whom child has resided who has acted as parent, or (5) guardian who has resigned (or proposes resignation; court will normally *not* accept resignation until successor is in place). [Wis. Stat.](#) § 48.831(1m).

CAUTION: The law regarding guardianship of minors changed extensively in August 2020. Lawyers should not take on minor guardianship cases without having completely and fully reviewed the new law. See sections [19.27–.36](#), *infra*, for additional discussion of the new law, [Wis. Stat.](#) § 48.9795.

- c. If DHS, county department, or agency petitions, report must be provided including child's social history and medical and genetic information; if relative petitions, court must order report with same information. [Wis. Stat.](#) §§ 48.831(2), 48.425(1)(a), (am), (g), 48.43(1)(c).
 - (1) If agency determines that it is unlikely child will be adopted or that adoption would not be in best interests of child, report must include plan for placing child in permanent family setting if pursuant to [Wis. Stat.](#) ch. 48.
 - (2) Plan must include recommendation as to agency to be named guardian or recommendation that person appointed guardian under [Wis. Stat.](#) § 48.977(2) continue to be guardian.
- d. Petition may be filed for guardianship of minor if child has been adjudged in need of protection or services; child has been placed with petitioner or placement with petitioner has been recommended and child will likely continue to be placed until age 18, and petitioner is willing to be guardian until child reaches age 18; it is not in the child's best interests to terminate parental rights at the time; parent(s) cannot or will not carry out duties of a guardian; and reasonable efforts have been made to return child to the home. [Wis. Stat.](#) § 48.977(2).

NOTE: The court must make findings on a case-by-case basis based on circumstances specific to the child and must document or reference specific information in the order.

- e. Court may designate placement with guardian as permanent foster placement, but only for purposes of [Wis. Stat.](#) § 48.368(2) or 938.368(2). [Wis. Stat.](#) § 48.977(3).

f. Under [Wis. Stat.](#) § 48.977(4)(a), petition for guardianship in such cases may be filed by

- (1) Child or child's guardian or legal custodian;
- (2) Guardian ad litem (GAL);
- (3) Parent;

NOTE: Committed party in nonmarital relationship who has not adopted the child is not a parent and cannot petition for guardianship as a parent over the objection of a fit and willing parent. [Wis. Stat.](#) §§ 48.82, 765.001(2); *Wendy M. v. Helen E.K. (In re Guardianship of O.G.M-K)*, 2010 WI App 90, 327 Wis. 2d 749.

- (4) Person with whom child is placed or in whose home placement of child is recommended if person is nominated as guardian;
- (5) DHS;
- (6) Certain county departments as indicated in [Wis. Stat.](#) § 46.22 or 46.23, or if the child is placed under [Wis. Stat.](#) ch. 938, a county department under [Wis. Stat.](#) § 46.215, 46.22, or 46.23;
- (7) Licensed child-welfare agency assigned responsibility for child under a court order;
or
- (8) Person representing interests of public under [Wis. Stat.](#) § 48.09.

g. Only the court or an "interested party" may petition for appointment of successor guardian. *Interested party* for purposes of proceeding after initial order for guardianship is defined as the guardian, spouse, or adult child of an adult under guardianship or the county of venue. [Wis. Stat.](#) §§ 54.01(17)(b), 54.54; *Kristin M.S. v. Sawyer Cnty. Dep't of Hum. Servs. (In re Guardianship of Paul V.)*, No. 2008AP112-FT, 2008 WL 2574489 (Wis. Ct. App. July 1, 2008) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

2. Time limits

- a. Petitions under [Wis. Stat.](#) ch. 54 must be heard within 90 days after filing. In guardianship cases, time limits cannot be extended. [Wis. Stat.](#) §§ 54.44(1)(a), (b), 55.10(1); see *Tina B. v. Richard H. (In re Guardianship of Elizabeth M.H.)*, 2014 WI App 123, 359 Wis. 2d 204.
- b. Time limit is different for hearing in guardianship action that is accompanied by protective placement petition. Protective placement petition must be heard within 60 days unless court extends the time limit by an additional 45 days. [Wis. Stat.](#) § 55.10(1).
- c. Initial plea hearings on petitions under for [Wis. Stat.](#) § 48.977 guardianships must be held within 30 days after filing. [Wis. Stat.](#) § 48.977(4)(cm)1. If there is agreement, the parties may proceed straight to disposition. *Id.* Otherwise, the court may adjourn the matter and set the disposition date no more than 30 days after the plea hearing. *Id.*

NOTE: The statutory time period cannot be waived by stipulation or failure to object or for good cause in [Wis. Stat.](#) ch. 54 cases. *Tina B. v. Richard H. (In re Guardianship of Elizabeth M.H.)*, 2014 WI App 123, 359 Wis. 2d 204. [Wis. Stat.](#) ch. 48 cases can be set over.

3. Under [Wis. Stat.](#) § 54.34(1), a petition for guardianship must contain the following information:
- a. Proposed ward's name, date of birth, residence, and address and, if the proposed ward is a minor, whether the minor has been adopted.

- b. Nature of incapacity.

NOTE: The petition must specify the proposed ward's incompetency or specific spendthrift habits; for requirements when the petition alleges the person is not competent to refuse psychotropic medication, see section [19.47](#), *infra*.

- c. Nature and value of property, including
 - (1) Assets derived from U.S. Department of Veterans Affairs; and
 - (2) Other claims, income, compensation, pension, insurance, or allowance to which proposed ward may be entitled.
- d. Amount of income.
- e. Name of any existing guardian.
- f. Names and addresses of
 - (1) Nominee for guardian,
 - (2) All interested parties, and
 - (3) Person or institution having care and custody of proposed ward.
- g. Interest of petitioner and, if petitioner is public official, petitioner's authority to act.
- h. Whether proposed ward is recipient of a public benefit, including medical assistance or a benefit under [Wis. Stat.](#) § 46.27.
- i. Agent under any current, valid power of attorney that proposed ward has executed.
- j. Whether petitioner is requesting full or limited guardianship and, if limited, the specific authority sought by the petitioner for the guardian or specific rights of the individual that petitioner seeks to have removed or transferred.
- k. Whether proposed ward, if married, has children who are not children of the current marriage.

1. Whether petitioner is aware of any guardianship or conservatorship or related pending or ordered proceeding involving the proposed ward in another state or county, and, if so, the details of the proceedings.
4. May include application for protective placement under [Wis. Stat.](#) ch. 55; however, protective placement may not be obtained without guardianship; if placement is more than one year after determination of incompetency, court must review finding. [Wis. Stat.](#) §§ 54.34(2), 55.075(3).

NOTE: Many counties automatically appoint adversary counsel through the State Public Defender if protective placement or services are requested upon filing.

NOTE: The petition for guardianship must be heard before placement under [Wis. Stat.](#) ch. 55, but the petition for placement may be made concurrently with the petition for guardianship; they are filed as two separate petitions even if filed concurrently. [Wis. Stat.](#) § 54.34(2).

5. Appointment of guardian for person in nursing home licensed for more than 16 beds cannot be made if there is not concomitant order for protective placement under [Wis. Stat.](#) ch. 55. [Wis. Stat.](#) §§ 54.34(2m), 55.055(2)(b); *Cavey v. Milwaukee Cnty. (In re Guardianship of Agnes T.)*, 189 Wis. 2d 520 (1995).
 - a. Guardian of incompetent ward may consent to admission to foster home, group home, or CBRF without protective placement if facility has fewer than 16 beds. Before providing consent, and annually thereafter, guardian must review ward's right to least restrictive placement and may consent only to a home or facility that implements that right. [Wis. Stat.](#) § 55.055(1)(a).
 - b. A guardian cannot make permanent protective placement without court order, but he or she may make emergency protective placement under [Wis. Stat.](#) § 55.135. Guardian of incompetent ward may consent to ward's admission to nursing home or other facility with more than 16 beds, when ward needs recuperative care or is unable to provide for his or her own care or safety so as to create a serious risk of substantial harm to himself or herself or others. Placement cannot be for more than 60 days, but placement can be extended if a petition for protective placement has been filed under [Wis. Stat.](#) § 55.075. [Wis. Stat.](#) § 55.055(1)(b).
6. Petitioner for guardianship must cooperate with discovery, and persistent and egregious failure to cooperate may lead to appropriate sanctions. *George M.S. v. Hida (In re Guardianship of Ethel K.)*, No. 2004AP1506, 2005 WL 3536136 (Wis. Ct. App. Dec. 28, 2005) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
7. An appeal may be taken from final judgment or order to court of appeals within time specified in [Wis. Stat.](#) § 808.04(1), (3), and in accord with [Wis. Stat.](#) § 809.30, by proposed ward, guardian, or any petitioner or representative of public. [Wis. Stat.](#) § 55.20.
 - a. On appeal, appellate court will not disturb circuit court's factual findings in guardianship and protective placement matters unless circuit court's findings were clearly erroneous. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, 2003 WI App 223, 267 Wis. 2d 310.
 - b. Appellate court does not reweigh evidence or reassess witness credibility, particularly that of conflicting medical experts. *Dodge Cnty. v. L.W. (In re Guardianship of L.W.)*, No. 2020AP1754, 2021 WL 3673233 (Wis. Ct. App. Aug. 19, 2021) (unpublished opinion not

citable per [Wis. Stat.](#) § 809.23(3)) (review denied); *J.W. v. R.B. (In re Guardianship of R.B.)*, No. 2019AP197, 2020 WL 3669799 (Wis. Ct. App. July 7, 2020) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied).

D. Order Appointing Guardian [§ 19.795]

1. Issued after court finds the following to be true:
 - a. Person is proper subject for guardianship. See [Wis. Stat.](#) § 54.10.
 - b. Court of county where petition was filed has jurisdiction. [Wis. Stat.](#) § 54.30(1). (Note that personal jurisdiction is subject to [Wis. Stat.](#) ch. 53. [Wis. Stat.](#) § 54.30(1).)
 - c. Person is in need of guardian. See [Wis. Stat.](#) § 54.10.
 - d. Proposed guardian is suitable and proper person to act. [Wis. Stat.](#) § 54.15.
 - e. If person is to be admitted to nursing home or CBRF, court must make finding as to whether incompetence is potentially reversible. [Wis. Stat.](#) § 55.08(1)(d).
2. Under [Wis. Stat.](#) § 54.46(2), order appointing guardian must do all the following:
 - a. Appoint guardian; however, there may be separate guardians of person and estate. [Wis. Stat.](#) § 54.10(4).
 - b. Specify amount of any bond, if required. [Wis. Stat.](#) § 54.46(4).
 - c. Specify any powers of the guardian that require court approval under [Wis. Stat.](#) § 54.20(2) or 54.25(2). See [Wis. Stat.](#) §§ 54.46(2), 54.18.
 - d. Order reasonable compensation, to be paid from ward's income and assets, for legal fees incurred in successfully petitioning for guardianship, unless court determines it is inequitable to do so. [Wis. Stat.](#) § 54.46(3)(a).

NOTE: If guardianship is not granted, the petitioner is accountable for the fees due to the guardian ad litem and proposed ward's counsel. [Wis. Stat.](#) § 54.46(3)(c); *Ozaukee Cnty. Dep't of Hum. Servs. v. S.S.Z. (In re Guardianship & Protective Placement of S.S.Z.)*, No. 2017AP1393, 2018 WL 4510248 (Wis. Ct. App. Sept. 19, 2018) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

NOTE: The ward's estate is not financially responsible for expenses incurred by petitioners who have withdrawn their petition. *Yamat v. Verma L.B. (In re Guardianship & Protective Placement of Verma L.B.)*, 214 Wis. 2d 207 (Ct. App. 1997).

NOTE: Legal expenses of proposed ward for contesting guardianship must be paid before any other attorney or GAL fees. [Wis. Stat.](#) § 54.42(4).

E. Letters of Guardianship [§ 19.796]

See [Wis. Stat.](#) § 54.46(5).

1. Issued under court seal to guardian.
2. Issued after hearing, completion of determination and order, and
 - a. Guardian of estate provides bond as required (*bond not required for guardian of person*) and court approves bond; or
 - b. Court waives bond (1) based on its discretionary ability to do so, (2) if waiver is requested in will nominating guardian, or (3) if guardian will have possession of ward's funds with a total value of \$100,000 or less and court directs deposit of the funds in insured account in certain manner. [Wis. Stat.](#) § 54.46(4)(b).
3. Specify nature of guardianship (of person, estate, or both) and any powers of the guardian that require court approval under [Wis. Stat.](#) § 54.20(2) or 54.25(2). See [Wis. Stat.](#) § 54.46(2).

F. Bond [§ 19.797]

1. Applies to guardian of estate only. [Wis. Stat.](#) § 54.46(4)(a).
2. Court may waive bond except as indicated in para. b., *infra*. [Wis. Stat.](#) § 54.46(4)(b).
 - a. If ward's funds total less than \$100,000 and court requires deposit in insured account (account may be in bank, credit union, savings bank, or savings and loan association). [Wis. Stat.](#) § 54.46(4)(b)3.
 - (1) Deposited in name of guardian and ward.
 - (2) Payable on further order of court.
 - b. Bond is mandatory under Uniform Veterans' Guardianship Act if veterans' benefits are involved. [Wis. Stat.](#) § 54.852(9).
3. Court may determine amount of bond based on ward's assets (if assets increase during period of guardianship, bond must be correspondingly increased). See [Wis. Stat.](#) § 878.05.
4. Bond forms may be obtained from local probate office and individual sureties. See [Wis. Stat.](#) ch. 878; [Wis. Stat.](#) § 895.345.

G. Compensation of Guardians [§ 19.798]

See [Wis. Stat.](#) § 54.72.

1. Paid from guardianship estate.
2. Reasonable expenses allowed for
 - a. Attorneys. [Wis. Stat.](#) § 54.72(2).
 - b. Accountants. *Id.*

- c. Brokers. *Id.*
- d. Other agents. *Id.*
3. Compensation for guardian that court deems just and reasonable will be allowed. [Wis. Stat. § 54.72\(1\)\(b\)](#).
4. Under [Wis. Stat. § 54.72\(1\)\(b\)](#), factors to be considered in determining compensation include the following:
 - a. Reasonableness of services
 - b. Fair market value of services
 - c. Conflict of interest
 - d. Availability of another to provide services
 - e. Value of ward's assets and income
 - f. Whether ward's basic needs are met
 - g. Rate proposed by guardian
5. Court may establish compensation at time of appointment. [Wis. Stat. § 54.72\(1\)\(c\)](#).
6. Reimbursement of reasonable expenses must be allowed. [Wis. Stat. § 54.72\(2\)](#).
7. Court approval must be obtained before payment but not before services rendered. [Wis. Stat. § 54.72\(3\)](#).
8. Monthly payments authorized to guardian of a child under [Wis. Stat. § 48.977](#), including to a sibling of the child if the county department approves placement and child meets specified conditions. [Wis. Stat. § 48.623](#).
9. Subsidized guardianship payments may be made to a guardian of a child under [Wis. Stat. § 48.623](#), if a subsidized agreement is entered into before the guardianship is granted and the court either terminates any order in which the child has been adjudicated in need of protective services or dismisses any action for provision of protective services. [Wis. Stat. § 48.977\(3r\)\(a\)](#).
10. Under [Wis. Stat. § 48.977\(3r\)\(b\)](#), subsidized guardianship payments cannot be made to a successor guardian of a child under [Wis. Stat. § 48.623](#) unless all the following conditions are met:
 - a. Court makes a finding that the successor guardian was named as a prospective successor guardian of the child in a subsidized guardianship agreement or amended subsidized guardianship agreement that was entered into before the death or incapacity of the guardian and that the conditions in [Wis. Stat. § 48.623\(6\)](#) have been met.

- b. Court appoints the successor guardian to assume the duties and authority of guardian.
- c. Court either terminates any special order or dismisses any proceeding in which the child has been adjudicated in need of protection or services.

III. GUARDIAN AD LITEM [§ 19.799]

A. In General [§ 19.800]

See [Wis. Stat.](#) § 54.40(3); *see also infra* § [19.31](#).

1. GAL must advocate for best interests of proposed ward or ward.
2. GAL must function independently, in the same manner as an attorney for party to an action.
3. GAL must consider, but *is not bound by*, wishes of proposed ward or ward or others' positions as to proposed ward's best interests.

NOTE: Ward's counsel must advocate for the wishes of the ward even if they conflict with the position of the GAL. [Wis. Stat.](#) § 48.23; *E.H. v. Milwaukee Cnty. (In the Int. of T.L.)*, 151 Wis. 2d 725 (Ct. App. 1989).

4. GAL has none of the rights or duties of a guardian.
5. When an unborn child is alleged to be in need of protection or services, expectant mother must have counsel and cannot waive that right; if expectant mother is under 12 years of age, court may appoint GAL instead of counsel. [Wis. Stat.](#) § 48.23(2m).
6. When any child is the subject of a proceeding involving contested adoption or involuntary termination of parental rights, any parent (whether a minor or an adult) is entitled to representation by counsel; parent 18 or older may knowingly and voluntarily waive counsel. [Wis. Stat.](#) § 48.23(2).

B. Specific Duties and Authority [§ 19.801]

See [Wis. Stat.](#) § 54.40(4).

1. Interview proposed ward and explain contents of pleadings, hearing procedure, right to counsel, and right to request or continue a limited guardianship.

NOTE: If a ward is represented by adversary counsel, the GAL cannot interview the ward outside the adversary counsel's presence. One court found that a ward is entitled to the presence of counsel in any interview with the GAL because the incompetence of the ward enhances the disparity in legal-skill level between the GAL and the ward. In addition, presence of adversary counsel helps prevent needless manipulation by the GAL of the ward's wishes and best interests and inadvertent disclosure of privileged information. *Jennifer M. v. Maurer (In re Guardianship of Jennifer M.)*, 2010 WI App 8, 323 Wis. 2d 126.

2. *Both orally and in writing*, advise proposed ward of right to be present at the guardianship proceedings, request a jury trial, appeal, counsel, and independent medical or psychological

examination on issue of competency (at county expense if proposed ward is indigent). Court lacks jurisdiction to hear the petition for guardianship if GAL's waiver of ward's appearance does not meet statutory requirements. [Wis. Stat.](#) § 54.44(4); *Knight v. Milwaukee Cnty. (In re Guardianship & Protective Placement of Muriel K.)*, 2002 WI App 194, 256 Wis. 2d 1000; see also *Jefferson Cnty. v. Joseph S. (In re Protective Placement with Guardianship of Joseph S.)*, 2010 WI App 160, 330 Wis. 2d 737.

3. Interview proposed guardian and any other person seeking appointment as guardian (as well as standby guardian).
4. Make a recommendation as to fitness of guardian.
5. Review statement of guardian under [Wis. Stat.](#) § 54.15(8) and report to court.
6. Review any advance-planning documents to determine adequacy; must interview any agent appointed by the ward and report to court about adequacy of any advance-planning documents.
7. Request court to order additional medical, psychological, or other evaluation, if necessary.
8. If applicable, inform court of the following:
 - a. Proposed ward's objection to a finding of incompetence or to the nominated guardian.
 - b. Proposed ward's objection to present or proposed placement and the GAL's recommendation as to best interests.
 - c. Proposed ward's desire to have attorney. [Wis. Stat.](#) § 48.23; see *E.H. v. Milwaukee Cnty. (In the Int. of T.L.)*, 151 Wis. 2d 725 (Ct. App. 1989).
 - d. Proposed ward's or alleged incompetent person's ambiguous position (if ward is uncertain of desire for an attorney, etc.).

NOTE: A minor 15 or older may waive counsel except in cases, whether contested or uncontested, in which the child is to be placed outside home.

9. Attend all court hearings and present evidence concerning best interests if necessary.
10. Report to court on any other relevant matter if court requests.

C. Guardian ad Litem's Duties in Reviews [§ 19.802]

[Wis. Stat.](#) § 55.195; *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65 (1985).

1. In any review of protective placement or protective-service order, the GAL must do all the following:
 - a. Interview ward to explain review procedure and ward's right to independent evaluation, counsel, and hearing.
 - b. Provide information in para. a., *supra*, to ward in writing.

- c. Secure additional evaluation if necessary.
 - d. Review annual report and other relevant reports on ward's condition and placement.
 - e. Review with guardian ward's condition, placement, and rights.
2. If applicable, inform court of the following:
 - a. Ward's objection to finding of continued incompetence or to present or proposed placement.
 - b. Guardian's position and GAL's recommendation as to ward's best interests.
 - c. Ward's uncertainty on these matters.

NOTE: If the guardian has died, is not performing duties, or is not acting in the ward's best interests, it is appropriate for the GAL to notify the court of these concerns in the GAL's report. The GAL, as an interested party, may personally petition for a separate review of placement, review of the guardian's conduct, or the appointment of a successor guardian. *See Linda L. v. Collis (In re Guardianship & Protective Placement of Catherine P.)*, 2006 WI App 105, 294 Wis. 2d 637; *see* [Wis. Stat.](#) § 55.195.

3. If relevant, report ward's request for counsel or adversary hearing. [Wis. Stat.](#) § 55.195(8).
4. County department's review must be conducted annually; first review must be within 12 months after placement; failure to conduct hearing within time period violates due process. *Douglas Cnty. v. Florence S. (In re Guardianship & Protective Placement of Florence S.)*, No. 96-0863, 1996 WL 554295 (Wis. Ct. App. Oct. 1, 1996) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (reversing order entered after 16 months).

NOTE: Circuit court's annual review need not be *completed* within one year. *Milwaukee Cnty. v. C.L.-K. (In re Guardianship of C.L.-K.)*, No. 2015AP2031, 2016 WL 2975027 (Wis. Ct. App. May 24, 2016) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

D. Communication to Jury [§ 19.803]

The court or GAL may tell the jury that the GAL represents the interests of the proposed ward or alleged incompetent person. [Wis. Stat.](#) § 54.40(5).

E. Qualifications of GAL [§ 19.804]

See [Wis. Stat.](#) § 54.40(2).

1. Attorney admitted to practice in Wisconsin.
2. Must be uninterested, unrelated party, and not disqualified. *Tamara L.P. v. Dane Cnty. (In re Guardianship & Protective Placement of Tamara L.P.)*, 177 Wis. 2d 770 (Ct. App. 1993).
3. Must not appear as counsel on behalf of any party.

4. Incompetent ward cannot waive conflict of interest. *Guerrero v. Cavey (In re Guardianship & Protective Placement of Lillian P.)*, 2000 WI App 203, 238 Wis. 2d 449.
5. Must not be related to or representative of interested party.
6. [Wis. Stat.](#) § 757.48(1)(a) requires GAL appointed under [Wis. Stat.](#) § 767.407 to have completed three hours of GAL-specific continuing legal education, including training on dynamics of domestic violence and its effect on children. *State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94 (1990); [SCR](#) ch. 35.

F. Appointment [§ 19.805]

See [Wis. Stat.](#) § 54.40(1).

1. Court must appoint a GAL in the following situations:
 - a. Guardianship under [Wis. Stat.](#) § 54.34(1) is proposed.
 - b. Receipt and acceptance of a foreign guardianship [Wis. Stat.](#) § 54.34(3).
 - c. Protective placement under [Wis. Stat.](#) ch. 55 is proposed.
 - d. Any protective placement or protective service order under [Wis. Stat.](#) § 55.18 is reviewed.
 - e. Protective placement under [Wis. Stat.](#) § 55.17 is terminated.
 - f. Scope of guardianship order under [Wis. Stat.](#) § 54.63 is reviewed.
 - g. Incompetency and termination of a guardianship under [Wis. Stat.](#) § 54.64 is reviewed.
 - h. Guardian's conduct is reviewed under [Wis. Stat.](#) § 54.68.
 - i. Determination by court that appointment is necessary.
 - j. Specific cases in which GAL appointment is required involving minors, including involving unborn children and minor parents or incompetent parents, set forth in [Wis. Stat.](#) § 48.235.
 - k. Objection is made to the transfer of guardianship to another state. [Wis. Stat.](#) § 53.31.
2. No GAL may receive money or property from ward, and no bond may be required of a GAL. [Wis. Stat.](#) § 757.48(3).
3. Family matters in which GAL appointment is *not* required are set forth in [Wis. Stat.](#) § 767.407(1)(am).

G. Termination and Extension of Appointment [§ 19.806]

See [Wis. Stat.](#) § 54.40(6).

1. Appointment terminates either on entry of court's final order or termination of any appeal in which the GAL participates, even if adversary counsel is appointed.
2. Court may extend appointment or reappoint GAL by order specifying scope of responsibilities. [Wis. Stat.](#) § 48.235(7).
3. At any time, the GAL, any party, or a person for whom appointment is made may request that court terminate any extension or reappointment. [Wis. Stat.](#) § 48.235(7).
4. If appeal is taken, the GAL may appeal or participate in appeal or decline to appeal or participate in appeal. See [Wis. Stat.](#) ch. 809.
 - a. If any party appeals and the GAL does not participate, the GAL must file with appellate court a statement of reasons for not participating.
 - b. Appellate court may order the GAL to participate.
5. Even if adversary counsel is appointed for a ward, the GAL continues to represent *best interests of ward*, not ward's wishes. *Tamara L.P. v. Dane Cnty. (In re Guardianship & Protective Placement of Tamara L.P.)*, 177 Wis. 2d 770 (Ct. App. 1993).
6. Attorney who acted as adversary counsel for ward in [Wis. Stat.](#) ch. 51 proceeding for involuntary commitment cannot later act as GAL in guardianship proceeding under [Wis. Stat.](#) ch. 54 because of substantial relationship of proceedings. *Tamara L.P.*, 177 Wis. 2d 770.
7. Ethical standards for GAL are the same as those for attorney in any other matter.

H. Compensation of Guardian ad Litem [§ 19.807]

See [Wis. Stat.](#) §§ 757.48(1)(b), 54.46(3)(b), 54.74.

1. GAL will receive compensation for performing all duties required under [Wis. Stat.](#) § 54.40(4) and any other services approved by court or reasonably necessary for ward's interest from ward's income and assets, or by the county of venue, if ward's income and assets are insufficient. [Wis. Stat.](#) § 54.74.
2. If petition for guardianship was dismissed, court must order petitioning party to pay compensation of GAL. *Id.*; [Wis. Stat.](#) § 54.46(3)(c).
3. Court may order payment of reasonable compensation (amount ordered to be paid by county may not exceed compensation paid to private counsel under [Wis. Stat.](#) § 977.08(4m)(b)). If the attorney of record is also the GAL, only attorney fees will be paid.
4. Court may also order payment out of ward's income if ward is Title XIX recipient and has income.
5. Court may also order payment of legal fees owed to proposed indigent ward's legal counsel if ward's county of legal residence is liable for GAL fees and if counsel was not appointed under [Wis. Stat.](#) § 977.08. [Wis. Stat.](#) § 54.46(3)(b).

IV. GUARDIANSHIP OF ADULTS [§ 19.808]

A. General Duties and Powers of Guardian [§ 19.809]

See [Wis. Stat.](#) § 54.18.

1. Exercise only those powers that guardian is authorized to exercise by statute or court order, using least restrictive form of intervention.
2. Exercise degree of care, diligence, and good faith when acting on ward's behalf that ordinarily prudent person exercises in his or her own affairs.
3. Advocate for ward's best interests, including, if ward is protectively placed under [Wis. Stat.](#) ch. 55 and if applicable, advocating for ward's applicable rights under [Wis. Stat.](#) §§ 50.09 and 51.61.
4. Exhibit utmost degree of trustworthiness, loyalty, and fidelity in relation to ward.
5. Notify court of any change of address of guardian or ward.
6. Do not lend ward's funds to oneself; lend ward's funds to another individual or entity, unless court first approves terms, interest rate, and security requirement; or purchase ward's property, except at fair market value, subject to [Wis. Stat.](#) ch. 786, and with court approval.
7. Perform guardianship duties in good faith, in ward's best interests, and with degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs, so as to be immune from civil liability for his or her acts or omissions in performing duties.

NOTE: Guardian was personally liable for debt incurred on behalf of ward after guardian was found to have intentionally misled service provider that ward was eligible for medically specialized services. Court reduced amount of compensatory damages but allowed punitive damages. Court also found assets of guardian's spouse could be considered in award of damages for intentional tort. *Top Hat, Inc. v. Moen*, No. 2004AP362, 2005 WL 984135 (Wis. Ct. App. Apr. 28, 2005) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

B. Duties and Powers Guardian of Estate [§ 19.810]

See [Wis. Stat.](#) §§ 54.19, 54.20.

1. Generally, guardian of estate must provide ward with greatest amount of independence and self-determination with respect to property management.
2. Manage ward's property with appreciation of ward's functional limitations and ward's personal wishes and preferences.
3. Use judgment and care that persons of prudence, discretion, and intelligence exercise in management of their own affairs, including permanent, rather than speculative, disposition of funds and consideration of probable income and safety of capital. See *Kellogg-Citizens Nat'l*

Bank of Green Bay v. Borden (In re Guardianship of Hougard), 107 Wis. 2d 599 (Ct. App. 1982).

NOTE: The court will not substitute its judgment for the guardian's.

4. Except as specifically limited in the order of appointment, guardian of estate must do the following:
 - a. Take possession of ward's real and personal property, and income, rents, and proceeds to maintain and support ward and any legal dependents of ward.
 - (1) File with register of deeds of county in which ward possesses real property a sworn and notarized statement that specifies property's legal description, date when ward is determined to be incompetent, and name, address, and telephone number of ward's guardian and any surety on guardian's bond. *See* Statement of Ward's Real Property Filed with Register of Deeds, Form GN-3450.

NOTE: The title to such items remains vested in the ward's ownership.

- (2) Apply to be appointed ward's representative payee or ensure that representative payee is appointed for ward who receives income from Social Security Administration or Department of Veterans Affairs.

NOTE: A guardian of estate cannot prevent a joint owner from withdrawing money from an account in which a ward is also a joint owner. [Wis. Stat.](#) § 705.03 provides that "the application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or disability." *Family Servs., Inc. of Barron Cnty. v. Gary W. (In re Guardianship of Emma W.)*, 2003 WI App 132, 265 Wis. 2d 681.

- b. Determine whether ward has previously executed any estate planning documents, such as a will, to determine appropriate persons to notify in event of ward's death.
 - c. File inventory within 60 days after appointment and file annual account with court. [Wis. Stat.](#) §§ 54.60, 54.62; *see infra* § [19.25](#).
 - d. Pay ward's legally enforceable debts, including by filing tax returns to pay taxes owed, from guardianship estate.
 - e. Retain, sell, and invest estate assets as provided by law.

NOTE: Guardian may step into shoes of ward to pursue action on ward's behalf when ward's rights are being directly violated or ward has been injured. [Wis. Stat.](#) § 54.20(3)(j).

- f. Obtain prior approval of court for specific powers under [Wis. Stat.](#) § 54.20(2), including the following:
 - (1) Gifts;
 - (2) Transfers to revocable living trusts;

- (3) Creation of qualifying irrevocable special needs trusts, pursuant to 42 [U.S.C.](#) § 1396p(d)(4);
- (4) Purchase of and exercise of ward's rights under an annuity or insurance contract;
- (5) Establishment and exercise of rights under retirement plan;
- (6) Release or disclaim ward's beneficial interest, *Kellogg-Citizens Nat'l Bank of Green Bay v. Borden (In re Guardianship of Hougard)*, 107 Wis. 2d 599 (Ct. App. 1982);
- (7) Exercise of elective rights that accrue to ward as a result of death of ward's spouse or parent;
- (8) Exercise of rights to marital property of ward, including entering into marital property agreement in which Medicaid is involved;
- (9) Support of person the ward is not legally obligated to support;
- (10) Continuation of the business of ward;
- (11) Apply for adjustment of claims against ward; and
- (12) Access to ward's digital property in accordance with [Wis. Stat.](#) § 711.08.

NOTE: Legal standard that circuit court is to use in deciding whether to approve exercise of power by guardian of estate is whether exercise of power will benefit ward, ward's estate, or member of ward's immediate family. *V.D.H. v. Circuit Ct. for Ozaukee Cnty. (In re Guardianship of F.E.H.)*, 154 Wis. 2d 576 (1990).

5. Guardian has standing to appeal a finding of the court while guardianship is in effect but not after guardianship. [Wis. Stat.](#) § 879.27(4).

C. Specific Duties and Authority of Guardian of Estate [§ 19.811]

1. Prepare inventory of all assets of ward. [Wis. Stat.](#) § 54.60, ch. 858.
 - a. Same process as for a decedent's estate.
 - b. Verify inventory. [Wis. Stat.](#) § 54.60(7).
 - c. Obtain appraisal when ordered by court. [Wis. Stat.](#) § 54.60(6).
 - d. File an inventory or account, along with payment of fee, within 60 days after appointment unless court extends or reduces time. [Wis. Stat.](#) § 54.60(3). If no assets, account must still be filed and minimum fee paid to court. [Wis. Stat.](#) § 54.60(5); see [Wis. Stat.](#) § 814.66.
 - e. Court can direct guardian to provide copies of inventory to certain interested parties. [Wis. Stat.](#) § 54.60(4).

- f. Court may order guardian to file if he or she has neglected to do so, and court may then assess costs against guardian. [Wis. Stat.](#) § 54.60(8).
 - g. If court believes guardian has filed a false inventory or account, court may take appropriate steps to require accounting, removal of guardian, and other potential remedies. See [Wis. Stat.](#) § 54.68.
 - h. Inventory must include all assets and must be updated if values change, as in case of recovery in tort matters; inventory must include receipt of insurance proceeds or other receipt of substantial funds. *Angela S. v. Jefferson Cnty. (In re Guardianship of Bradley C.S.)*, 2006 WI App 260, 297 Wis. 2d 42.
2. Prepare annual accounting. [Wis. Stat.](#) §§ 54.62, 54.19(5).
 - a. Accounting due before April 15 of each year unless ordered by court to be within 60 days after anniversary of guardian's appointment. [Wis. Stat.](#) § 54.62(1).
 - b. List receipts, expenditures, balance, and nature of any investments. [Wis. Stat.](#) § 54.62(1).
 - c. Court will examine unsatisfactory accounts. [Wis. Stat.](#) § 54.62(5).
 - (1) Guardian receives notice served personally or by certified mail as court directs.
 - (2) Court makes order as justice requires, but no order final without notice. [Wis. Stat.](#) § 54.62(5), (7).
 - (3) If court believes guardian has committed fraud, waste, or mismanagement, court may take appropriate steps to require accounting, removal of guardian, and other potential remedies. [Wis. Stat.](#) § 54.68(2).
 - d. Estates that do not exceed amount specified in [Wis. Stat.](#) § 867.03(1g) (\$50,000) require accounting only at termination of guardianship, unless court orders otherwise. [Wis. Stat.](#) §§ 54.66(2), 54.62(3)(a).
 3. Display assets to court. [Wis. Stat.](#) § 54.62(2).
 - a. At each accounting, exhibit original indicia of investments, securities, and deposits.
 - b. Court has power to exempt trust company or bank with trust powers that comply with [Wis. Stat.](#) § 223.02 if bank files timely examiner's certificates that include examination of all trust accounts.
 4. Notify court if assets of ward increase, requiring additional bonding.
 5. Continue ward's business as ordered by court. [Wis. Stat.](#) § 54.20(2)(k).
 6. Invest and reinvest proceeds of sale of any assets and other funds. [Wis. Stat.](#) § 54.20(3)(h).
 - a. If in accordance with [Wis. Stat.](#) ch. 881, court approval not necessary. [Wis. Stat.](#) § 54.20(3).

- b. Without regard to [Wis. Stat.](#) ch. 881 when investing in real or personal property that court determines to be in best interests of guardianship estate. [Wis. Stat.](#) § 54.20(3)(i).
- c. Loans from guardianship estate to guardian are prohibited. [Wis. Stat.](#) § 54.18(3)(a).

NOTE: The statutory provision did not preclude a home-building loan used to provide additional living space for the wards, but the loan had to be repaid when the ward reached age 18. *W.L.M. v. P.H.G. (In re Guardianship of J.L.G.)*, 145 Wis. 2d 131 (Ct. App. 1988).

- d. Limitations on investment powers not applicable to bank or trust company with trust powers.
- e. Guardian must *not* distribute assets to avoid future estate tax. However, guardian may transfer ward's assets to medical payback trust, if trust is set up to benefit ward and, after ward's death, to pay back benefit received before any other distribution. *Marjorie A.G. v. Dodge Cnty. Dep't of Hum. Servs. (In re Guardianship of Scott G.G.)*, 2003 WI App 52, 261 Wis. 2d 679; *Michael S.B. v. Berns (In re Guardianship of Stanley B.)*, 196 Wis. 2d 920 (Ct. App. 1995).

NOTE: A guardian of the estate of a married person has the power, *with approval of the court*, to distribute assets to manage current or prospective taxes or other expenses in the married person's estate. The guardian of a single person does not have this power. [Wis. Stat.](#) § 54.20(2)(h).

- 7. Sell investments other than real estate without court approval. [Wis. Stat.](#) § 54.20(3)(g).
 - a. Guardian may be purchaser only if at fair market value and subject to [Wis. Stat.](#) ch. 786 and with court approval. [Wis. Stat.](#) § 54.18(3)(c).
 - b. [Wis. Stat.](#) ch. 786 governs with respect to real estate, sale of which *must* be with court approval. [Wis. Stat.](#) §§ 786.06–.07.
- 8. Sell, mortgage, pledge, lease, or exchange other property with court approval. [Wis. Stat.](#) § 54.22.
 - a. Purposes
 - (1) Pay ward's debts
 - (2) Provide care, maintenance, and education of ward and dependents
 - (3) Other purpose if in ward's best interest
 - b. Court determines notice provisions.
 - c. Court orders terms of sale.

- d. Guardian may be purchaser only if at fair market value subject to [Wis. Stat.](#) ch. 786 and with court approval. [Wis. Stat.](#) § 54.18(3)(c).
9. Dispose of real estate.
- a. Subject to [Wis. Stat.](#) ch. 786. [Wis. Stat.](#) § 54.22.
 - b. [Wis. Stat.](#) § 786.06 provides that real estate may be sold, mortgaged, or leased when
 - (1) Personal property and income from real estate are insufficient to pay ward's debts or maintenance and education of ward and family, or
 - (2) Ward's interests would be substantially promoted because real estate is subject to waste or dilapidation or is unproductive or because of other peculiar reasons.

NOTE: See [Wis. Stat.](#) §§ 786.18 and 786.19 regarding life estates and reversionary interests.

Ward's interest is only appropriate issue to be considered; potential heir has no standing to object if sale is in ward's interest. *Elrod v. Brommer*, No. 01-0604, 2001 WL 1491609 (Wis. Ct. App. Nov. 27, 2001) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

- c. Guardian or any relative or other person on behalf of the ward may petition court in county where real estate is located or where guardian is appointed. [Wis. Stat.](#) § 786.07; *see* Application to Authorize and/or Confirm Sale/Mortgage/Lease of Real Estate of Ward Under Guardianship or Conservatorship, GN-3570.

A foreign guardian or conservator may petition court in county where property is located and file a copy of appointment, authenticated with court; upon filing, foreign guardian or conservator may be licensed by court to lease, mortgage, or sell property in same manner as guardian in state; foreign guardian, on same showing of authority, may petition for special guardian to lease, mortgage, or sell property. [Wis. Stat.](#) § 786.25.

- d. Court determines whether disposition is necessary and proper. [Wis. Stat.](#) § 786.10.
- e. Court enters order directing and authorizing guardian to contract for sale, lease, or mortgage of real estate. [Wis. Stat.](#) § 786.10; *see* Order to Authorize and/or Confirm Sale/Mortgage/Lease of Real Estate of Ward Under Guardianship, Form GN-3590.
- f. Guardian contracts, subject to confirmation of court. [Wis. Stat.](#) § 786.11.
- g. Court confirms agreement with order of confirmation. [Wis. Stat.](#) § 786.10.
 - (1) Requires guardian to execute lease, mortgage, or deed as directed (guardian *cannot* give warranty deed). [Wis. Stat.](#) § 786.11.

NOTE: This is to protect the guardian because guardian does not have history of property, and this could create huge risk of future lawsuits against guardian. Buyer, not guardian, takes risk.

- (2) Orders application and disposition of proceeds for duration of guardianship estate. [Wis. Stat.](#) §§ 786.17, 786.18.
- h. Guardian may expend usual and necessary costs, including brokers' fees, title insurance, survey costs, and transfer fee, all subject to court approval. [Wis. Stat.](#) § 786.11.
- i. Every deed, mortgage, lease, or other conveyance made in good faith by the guardian pursuant to circuit court's order or judgment is valid and effectual as if made by minor when of full age or incompetent person when of sound mind and memory. [Wis. Stat.](#) § 786.15; *Clear View Ests., Inc. v. Veitch*, 67 Wis. 2d 372 (1975).

10. May acquire real estate, subject to court approval; best interest of ward governs. [Wis. Stat.](#) §§ 786.12, 54.852(15).

NOTE: Courts tend to be very strict about this, especially with parents who may, for example, want to use a child's money to purchase a house; courts usually recommend that if funds come from a minor's settlement and the purchase is really needed, the matter should be resolved before the guardianship is set up.

11. Apply income and personal property as necessary for maintenance and support of ward and legal dependents. [Wis. Stat.](#) §§ 54.19, 54.22.

12. Pay ward's legally enforceable debts. [Wis. Stat.](#) § 54.19(7).

NOTE: A temporary guardian pays debts only on court order.

13. May apply to court for adjustment of claims against ward incurred before entry of order appointing guardian. [Wis. Stat.](#) § 54.20(2)(L), ch. 859.

- a. Court fixes time and place for claims adjustment.
- b. Procedure and statutes relating to claims in decedent's estate apply. [Wis. Stat.](#) § 879.05(4), ch. 859.

14. Settle ward's claims and accounts. [Wis. Stat.](#) § 54.20(3)(j).

15. Appear for and represent ward in all proceedings except when another person appointed for that purpose. [Wis. Stat.](#) § 54.20(3)(j).

16. A compromise or settlement of an action or proceeding involving a minor or an individual adjudicated incompetent may be made by a guardian, if guardian is represented by an attorney, or by GAL with approval of court in which proceeding is pending. [Wis. Stat.](#) § 807.10(1); *Kainz v. Ingles*, 2007 WI App 118, 300 Wis. 2d 670.

17. Guardian of estate of married person may, with approval of court, exercise power over marital, nonmarital, and business property. [Wis. Stat.](#) § 54.20(2)(h).

18. Guardian may consent to act jointly with other spouse and may make marital property agreement with other spouse but cannot make, amend, or revoke will. [Wis. Stat.](#) § 54.20(2)(h).

19. Court that appointed guardian for minor or incompetent person who is member of Menominee Indian tribe may direct guardian to transfer assets to trust created by Secretary of Interior. [Wis. Stat. § 54.625](#).
20. Perform any other duty required by court's order.

D. Specific Duties and Authority of Guardianship of Person [§ 19.812]

1. Specific duties and authority

See [Wis. Stat. § 54.25](#).

NOTE: The rights and powers of a guardian of the person must be specifically authorized by statute, rule, or court order. Individuals found incompetent have three categories of rights: (1) certain rights that they always retain, (2) rights that may be removed by a court and transferred to a guardian, and (3) rights that may be removed by a court's declaration of incompetence but that are not transferable to a guardian (although some may be exercised only with consent of the guardian of the person).

- a. Must file annual report on ward's condition to court that ordered guardianship and with county department designated under [Wis. Stat. § 55.02\(2\)](#).
- b. Must endeavor to secure any necessary care or services for ward that are in ward's best interests, based on the following:
 - (1) Regular inspection, in person, of ward's condition, surroundings, and treatment.
 - (2) Examination of ward's health-care records and treatment records and authorization for redisclosure as appropriate.
 - (3) Attendance and participation in staff meetings of any facility in which the ward resides or is a patient, if the meeting includes a discussion of the ward's treatment and care.
 - (4) Inquiry into risks and benefits of, and alternatives to, ward's treatment, particularly if drastic or restrictive treatment is proposed.
 - (5) Specific consultation with health-care and social services providers in making all necessary treatment decisions.

NOTE: Guardian can give informed consent to release of records other than *court*, *treatment*, and *health-care* records (only if specifically authorized by court). [Wis. Stat. § 54.25\(2\)\(d\)2.f](#).

- c. Possibly exercise the following powers in certain circumstances:
 - (1) Give informed consent to voluntary or involuntary medical examination and treatment and to voluntary receipt by ward of medication.

- (2) Participate in research projects.
 - (3) Consent to experimental treatment.
 - (4) Give informed consent to receipt by ward of social and supported-living services.
 - (5) Give informed consent to release of certain confidential records.
 - (6) Make decisions related to mobility and travel.
 - (7) Choose providers of medical, social, and supported-living services.
 - (8) Make decisions regarding educational and vocational placement and support services or employment.
 - (9) Make decisions regarding initiating a petition for termination of marriage.
 - (10) Receive all notices on ward's behalf.
 - (11) Act in all proceedings as an advocate of the ward in certain circumstances.
 - (12) Have custody of ward, if an adult, and power to have care, custody, and control of ward, if a minor.
 - (13) Any other power the court may specifically identify.
- d. May make temporary placement of ward who resides with guardian for up to 30 days to enable guardian to take vacation or for other family emergency. [Wis. Stat.](#) § 55.055(5).

NOTE: The court may extend placement to 60 days.

- e. May admit ward to certain residential facilities. [Wis. Stat.](#) §§ 55.055(1), 55.03(4). *See generally* [Wis. Stat.](#) § 54.25.
- (1) To foster home, group home, or CBRF licensed for fewer than 16 beds.
- NOTE: The guardian must determine *before admitting ward* that the placement is the least restrictive environment consistent with the ward's needs; also, the court cannot order guardianship for a nursing-home resident absent a concomitant protective placement order under [Wis. Stat.](#) ch. 55. [Wis. Stat.](#) § 55.055(1)(a); *see also Agnes T. v. Milwaukee Cnty. (In re Guardianship of Agnes T.)*, 179 Wis. 2d 363 (Ct. App. 1993), *aff'd*, 189 Wis. 2d 520 (1995).
- (2) To nursing home or other facility not identified in para. (1), *supra*, for which protective placement is required. [Wis. Stat.](#) § 55.055(1)(b).
 - (3) For recuperative care or if ward is unable to provide for his or her own care or safety so as to create a risk of substantial harm to himself or herself or others.
 - (4) Admission for period not to exceed 60 days.

Placement may be extended for an additional 60 days if a protective placement petition has been brought, or, if no petition has been brought, for an additional 30 days to allow initiation of discharge planning. Admission under [Wis. Stat. § 55.055\(1\)\(b\)](#) is not permitted for a person for whom the primary purpose of admission is mental illness or developmental disability.

- f. May make emergency protective placement if it appears probable that individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious physical harm to himself or herself or others if not immediately placed. At time of placement, individual must be informed by director of facility or designee orally and in writing of right to counsel and of payment of counsel at public expense if individual is minor or indigent; individual is also entitled to copy of statement. [Wis. Stat. § 55.135\(1\)](#).

NOTE: Emergency protective placements are generally initiated by law enforcement or county department or agency for elderly persons and persons with disabilities.

- g. May apply for protective placement of ward under [Wis. Stat. ch. 55](#); however, if application for such placement is made more than one year after guardian appointment, incompetence finding must be reviewed. [Wis. Stat. §§ 55.075\(3\), 54.25\(2\)\(d\)2.n](#).

NOTE: The guardian cannot consent to *voluntary* admission to a nursing home *unless* admission is for period not to exceed 60 days. However, a guardian may consent to admission to a foster home, group home, or CBRF with fewer than 16 beds without court approval, but before admission and annually thereafter, guardian must review the placement to make sure that it is in the least restrictive environment. [Wis. Stat. § 55.055\(1\)\(a\), \(b\)](#); *see* 72 Wis. Op. Att’y Gen. 194 (1983), https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/1983/Volume%2072_1983.pdf.

Appeal from any final order or judgment may be taken to court of appeals by proposed ward, guardian, or any person, subject to time limits of [Wis. Stat. § 808.04\(3\)](#) and in accordance with [Wis. Stat. § 809.30](#). [Wis. Stat. §§ 51.20\(15\), 55.20](#).

- h. May apply for commitment under [Wis. Stat. § 51.20](#) or [51.45\(13\)](#) and must endeavor to secure necessary care, services, or placement for the ward.
- i. May authorize medical treatment that is in ward’s best interests and not directly in contravention of ward’s rights.

NOTE: It is advisable to secure the court’s opinion in appropriate cases.

2. Supreme court has made a limited finding applicable to wards in a medically determined persistent vegetative state. A guardian “must begin with a presumption that continued life is in the best interest of the ward”; presumption may be overcome by guardian’s good-faith analysis of factors to the contrary. “[A]n incompetent individual in a persistent vegetative state has a constitutionally protected right to refuse unwanted medical treatment, including artificial nutrition and hydration.” “[W]here it is in the best interests of the ward to withhold or withdraw [life-sustaining medical] treatment, the guardian has not only the authority, but a duty to consent to the withholding or withdrawal of treatment”; moreover, “a guardian has identical

decision-making powers as a health care agent.” *Lenz v. L.E. Phillips Career Dev. Ctr. (In re Guardianship of L.W.)*, 167 Wis. 2d 53, 82 (1992).

In a lengthy decision, the supreme court refused to extend authority to a guardian to withdraw nutritional support or fluids if the ward is not in a persistent vegetative state; an exception applies if a preponderance of the evidence shows that the ward made a clear statement of his or her wishes for the withdrawal of life-sustaining treatment; whether a ward is in a persistent vegetative state is medical, not legal, determination. *Spahn v. Eisenberg (In re Guardianship & Protective Placement of Edna M.F.)*, 210 Wis. 2d 557 (1997).

NOTE: A guardian is a “state actor” because the guardian’s authority derives from the state’s power and is *purely* statutory; therefore, a patient must receive due process, but the state does not deprive the patient of life by failing to ensure that every possible medical technology is used. *Lenz*, 167 Wis. 2d at 82.

Legal guardian cannot sue alleged tortfeasor for loss of society and companionship of ward, nor can guardian bring separate claim against alleged tortfeasor for costs incurred or income lost on account of injuries to ward. *Conant v. Physicians Plus Med. Grp., Inc.*, 229 Wis. 2d 271 (Ct. App. 1999).

V. GUARDIANSHIP OF MINORS [§ 19.813]

CAUTION: The law discussed in this section changed extensively in August 2020. Readers should review 2019 Wis. Act 109 and [Wis. Stat.](#) § 48.9795 to familiarize themselves with the new law. Lawyers should not take on minor guardianship cases without having completely and fully reviewed the new law. Readers are further encouraged to purchase and review the following in-depth and comprehensive book: Henry J. Plum, *Minor Guardianships of the Person: Wisconsin Children’s Court Practice and Procedure* (State Bar of Wis. 2020).

2019 Wis. Act 109 was enacted on February 28, 2020, and went into effect on August 1, 2020. The Act brought significant changes to minor guardianship law in Wisconsin by creating a new process and standards for minor guardianships of the person and moving them into [Wis. Stat.](#) ch. 48, the Children’s Code. Under the Act, guardianships of a child’s estate remain governed by [Wis. Stat.](#) ch. 54 but may be consolidated into the [Wis. Stat.](#) ch. 48 case using the new procedures.

The Act removed minor guardianships of the person from [Wis. Stat.](#) ch. 54 and created a new statute, [Wis. Stat.](#) § 48.9795. This new law clearly transfers jurisdiction over all minor guardianships of the person to the juvenile court. Generally, the law creates four types of minor guardianships of the person: full, limited, temporary, and emergency. The law clarifies that a parent retains all rights and duties that are not assigned to the guardian or otherwise limited by statute or court order. For each type of guardian, the law provides standards for the appointment and duties of the guardian. Once appointed under the law’s new provisions, a full guardian has the duties and authority granted to other guardians under [Wis. Stat.](#) § 48.023, as well as the following: the authority, subject to a court order, to determine reasonable visitation with the minor; the right to change the minor’s residence from this state to another state; and the duty to report to the court immediately regarding any address changes and annually regarding the minor’s condition. The law also specifies in more detail the duties and obligations of the GAL in a minor guardianship, and new procedures will govern post-appointment matters. Children in need of protection or services (CHIPS) guardianships did not substantively change but are now referred to as [Wis. Stat.](#) § 48.977 guardianships on circuit court forms.

A. In General [§ 19.814]

1. A court may appoint a guardian of the person or a guardian of the estate, or both, for an individual if the court determines that the individual is a minor. Except as provided in [Wis. Stat.](#) §§ 48.427, 48.831, 48.977, and 48.978, an appointment of a guardian of the person of a minor will be conducted under the procedures specified in [Wis. Stat.](#) § 48.9795. [Wis. Stat.](#) § 54.10(1).
2. *Minor* means an individual who has not attained age 18. [Wis. Stat.](#) § 54.01(20).
3. Exceptions to the need to appoint a guardian of the estate for a minor child include the following:
 - a. Marriage. [Wis. Stat.](#) §§ 54.46(6), 54.64(3)(d), (4)(d).
 - (1) Revokes guardianship of person (except for a minor found incompetent).
 - (2) Minor's income and assets *may* be released in whole or in part on application.
 - (3) Guardianship of estate *may* be revoked on application.
 - b. Court need not appoint guardian of estate for minor when personal property is valued at amount specified in [Wis. Stat.](#) § 867.03(1g) (\$50,000 or less) but can instead, under [Wis. Stat.](#) §§ 54.12(1), 54.01(1), and 54.01(25), order that register in probate do one of the following:
 - (1) Deposit property into interest-bearing, insured account.
 - (2) Make payment to minor's parent or person having actual custody of minor.
 - (3) Make payment to minor.
 - (4) Make payment to agent under durable power of attorney.
 - (5) Make payment to trustee of trust created for ward's benefit.
 - c. When minor has no guardian and minor is entitled, if not for his or her incapacity, to possession of personal property of any value, court may order payment to custodian under Wisconsin Uniform Transfers to Minors Act ([Wis. Stat.](#) §§ 54.854–.898) or Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any other state (discretion rests with court to choose to use custodian in lieu of guardian). [Wis. Stat.](#) § 54.12(3).
 - d. When minor has no guardian, minor is entitled to possession of personal property valued at amount specified in [Wis. Stat.](#) § 867.03(1g) (\$50,000 or less) from estate administered informally without appointment of guardian. [Wis. Stat.](#) § 54.12(2).
 - (1) With approval of register in probate, take action as set forth in para. b., *supra*; or
 - (2) With approval of minor's GAL, take action as indicated in para. b., *supra*, and file proof of action so taken in lieu of receipt under [Wis. Stat.](#) § 865.21.

- e. [Wis. Stat.](#) § 48.831 may be used for appointment of guardian for child who does not have a living parent if finding of adoptability is sought; except as provided in [Wis. Stat.](#) §§ 48.977 and 48.978, [Wis. Stat.](#) § 48.9795 applies to all other applications for guardianship of a minor who does not have a living parent. A [Wis. Stat.](#) § 48.831 petition may be filed by DHS, county department, welfare agency, relative, a person with whom a child has resided who has acted as a parent, or guardian whose resignation has been accepted by court. See discussion in section 19.8, paras. b.–g., *supra*, regarding the filing of [Wis. Stat.](#) §§ 48.977, 48.978, and 48.831 petitions.

This provision does not abridge authority or duties of guardian appointed under [Wis. Stat.](#) § 48.9795, [Wis. Stat.](#) ch. 54 (2017–18), or [Wis. Stat.](#) ch. 880 (2003–04), nor does it prevent a petition under [Wis. Stat.](#) § 48.9795. [Wis. Stat.](#) § 48.977(8); *M.L.-F. v. Oneida Cnty. Dep’t of Soc. Servs. (In re Guardianship of B.C.L.-J.)*, 2016 WI App 25, 367 Wis. 2d 697.

NOTE: Procedures vary from county to county, and it is best to check with local courts before filing. For example, in Milwaukee County, guardianship-of-the-person petitions for minors are through children’s court, while guardianship-of-the-estate petitions for minors must go through probate court.

Children’s court jurisdiction is paramount in cases involving children (although other courts may exercise jurisdiction). [Wis. Stat.](#) §§ 48.133, 48.14, 48.15; *State ex rel. Rickli v. County Ct. of Dane Cnty.*, 21 Wis. 2d 89 (1963).

If there is a pending [Wis. Stat.](#) ch. 48 or 938 case, the guardianship cannot change the requirements of any court order in the underlying case, and the guardianship must be consistent with the permanency goals. [Wis. Stat.](#) § 48.9795(4)(a)1.–2. However, the court must stay any guardianship proceeding for the appointment of a full, limited, or temporary guardian of the person for a child under [Wis. Stat.](#) § 48.9795(4)(d)1., 2., or 3. until any matter pending under [Wis. Stat.](#) § 48.133, 48.133, or 48.14(1)–(10) or (12) or [Wis. Stat.](#) ch. 938 is resolved. [Wis. Stat.](#) § 48.9795(2)(b)2. The court may appoint an emergency guardian while a matter under those subsections or ch. 938 is pending if the court finds that the child’s best interests require doing so. *Id.*

NOTE: Attorneys should be aware that although [Wis. Stat.](#) § 48.9795 is a good resource to meet the needs of children and families, there are still cases that are better served in juvenile or family courts.

- f. Guardianship and termination of parental rights are custody proceedings, and determinations are subject to the requirements of [Wis. Stat.](#) ch. 822, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). [Wis. Stat.](#) § 822.02(4); *P.C. v. C.C. (In the Int. of A.E.H.)*, 161 Wis. 2d 277 (1991).

NOTE: Because a minor guardianship proceeding is subject to the UCCJEA, a petition should be accompanied by a UCCJEA Affidavit (Wisconsin circuit court form GF-150).

- g. The Indian Child Welfare Act (ICWA) is incorporated into [Wis. Stat.](#) § 48.9795. ICWA findings are included in the circuit court forms, with ICWA forms created where applicable designated by an IW form number.

B. Petition for Minor Guardianship [§ 19.815]

1. In a [Wis. Stat.](#) § 48.9795 guardianship, any person, including a child 12 years old or older on his or her own behalf, may petition for appointment of guardian for an individual. [Wis. Stat.](#) § 48.9795(4)(a)1. A court may appoint a guardian of the estate for an individual if the court determines that the individual is a minor. [Wis. Stat.](#) § 54.10(1).

If there is any matter pending under [Wis. Stat.](#) § 48.13, 48.133, or 48.14(1)–(10) or (12) or ch. 938, a petition under this subsection may be filed by any party to the pending matter or any person approved by the court if the petition is consistent with the goal or goals of the child’s permanency plan and does not seek to change the requirements of any preexisting court order issued under [Wis. Stat.](#) § 48.13, 48.133, or 48.14(1)–(10) or (12) or ch. 938. [Wis. Stat.](#) § 48.9795(4)(a)2.

2. [Wis. Stat.](#) § 48.977(4) provides that any of the following may petition for guardianship:
 - a. Child or the child’s guardian, legal custodian, or Indian custodian.
 - b. Child’s GAL.
 - c. Child’s parent.
 - d. Person with whom the child is placed or with whom it is recommended the child be placed, if that person is nominated as guardian.
 - e. Department of Children and Families.
 - f. A county department.
 - g. Licensed child welfare agency.
 - h. Person representing the interests of the public.
3. Contents of petition for a [Wis. Stat.](#) § 48.9795 guardianship of the person are listed in [Wis. Stat.](#) § 48.9795(4)(b). The same information is required for the full, temporary, or limited guardianship, except as it pertains to the specific facts necessary to support the grounds for each one. Emergency guardianships require a separate petition. (Wisconsin circuit court forms JN-1501 and IW-1501; use form JN-1504 for emergency guardianships; use form GN-3290 for guardianships of the estate of a minor.)
4. Contents of a [Wis. Stat.](#) § 48.977 petition for guardianship of a child also in need of protective services must include the following (*see also supra* § [19.8](#); use form JG-1605 for [Wis. Stat.](#) § 48.977 guardianships):
 - a. Name, birth date, and address of child.
 - b. Names and addresses of child’s parents, guardian, and legal custodian, the person nominated as the guardian of the child in the petition, and any person nominated as a successor guardian of the child in the petition.
 - c. Date child was adjudged in need of protection or services.

- d. Date of placement outside home.
 - e. Statement of facts and circumstances.
 - f. Statement of whether child is subject to the UCCJEA under [Wis. Stat.](#) ch. 822.
 - g. Statement of whether child is subject to federal Indian Child Welfare Act, 25 [U.S.C.](#) §§ 1911–1963.
5. For discussion of temporary guardianship of the estate procedure for minors, see sections [19.55–.58](#), *infra*.

C. Notice of Minor’s Guardianship Hearing [§ 19.816]

1. [Wis. Stat.](#) § 48.9795(1)(a)1. provides that the following “interested persons” must be served:
 - a. The child, if he or she has attained 12 years of age, and the child’s guardian ad litem and counsel, if any;
 - b. The child’s parent, guardian, legal custodian, and physical custodian;
 - c. Any person who has filed a declaration of paternal interest under [Wis. Stat.](#) § 48.025, who is alleged to the court to be the father of the child, or who may, based on the statements of the mother or other information presented to the court, be the father of the child;
 - d. Any individual who is nominated as guardian or as a successor guardian;
 - e. If the child has no living parent, any individual nominated to act as fiduciary for the child in a will or other written instrument that was executed by a parent of the child;
 - f. If the child is receiving or in need of any public services or benefits, the county department or, in a county having a population of 750,000 or more, the department that is providing the services or benefits, through the district attorney, corporation counsel, or other officials designated under [Wis. Stat.](#) § 48.09;
 - g. If the child is an Indian child, the Indian child’s Indian custodian and Indian tribe; and
 - h. Any other person that the court requires.
2. [Wis. Stat.](#) § 54.38(3) provides that the following persons must be served in minor guardianships of the estate:
 - a. The proposed ward’s spouse, if any;
 - b. The proposed ward’s parent, unless the parent’s parental rights have been judicially terminated;
 - c. The proposed ward, if the proposed ward is over 14 years of age; and

- d. Any other person that has legal or physical custody of the minor.

NOTE: The same persons entitled to notice under [Wis. Stat. § 54.38](#) must be given notice when transferring a guardianship to or from another state under [Wis. Stat. § 53.31](#) or [53.32](#).

NOTE: Notice of rehearing to determine whether guardianship is to be continued must be given to all parties listed above. [Wis. Stat. § 54.38\(4\)](#).

3. [Wis. Stat. § 48.977\(4\)\(c\)1.](#) provides that the following persons must be served:
 - a. The child if the child is 12 years of age or older;
 - b. The child's guardian and legal custodian;
 - c. The child's GAL;
 - d. The child's counsel;
 - e. The child's parent;
 - f. The persons to whom notice is required to be given under [Wis. Stat. § 48.27\(3\)\(b\)1.](#);
 - g. The person with whom the child is placed or in whose home placement of the child is recommended as described in [Wis. Stat. § 48.977\(2\)\(a\)](#), if the person is nominated as the guardian of the child in the petition;
 - h. The person representing the interests of the public under [Wis. Stat. § 48.09](#);
 - i. The agency primarily responsible for providing services to the child under a court order; and
 - j. If the child is an Indian child, the Indian child's Indian custodian, if any, and tribe, if known.
4. Service in a [Wis. Stat. § 48.9795](#) guardianship must be made at least seven days before hearing by personal service, certified mail, or written admission of service. Proof of service is required. [Wis. Stat. § 48.9795\(4\)\(c\)1.](#) Service in an emergency guardianship must be as soon after the filing of the petition as possible, by the most practical means possible, including personal service or service by email or telephone. [Wis. Stat. § 48.9795\(6\)\(b\)2.](#)

If the child is subject to ICWA, the party seeking the appointment of guardian for a child must provide notice of the hearing and this petition to the Indian child, Indian child's parents, Indian custodian, and Indian tribe at least 10 days before the date of the hearing. If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, notice must be provided at least 15 days before the date of the hearing to the U.S. Secretary of the Interior. Proof of registered mail is required. [Wis. Stat. § 48.9795\(4\)\(c\)3.](#)

- a. Notice of hearing to GAL and adversary counsel must be as soon as possible after filing via first-class mail or personal service. [Wis. Stat. § 48.9795\(4\)\(c\)1.](#)

- b. Failure to serve deprives the court of jurisdiction unless notice is waived by interested person or court for good cause shown. [Wis. Stat.](#) § 48.9795(4)(c)1.
5. Under [Wis. Stat.](#) § 48.977(4)(c)2., service must be accomplished in one of the following ways:
- a. By first-class mail at least seven days before the hearing;
 - b. By personal service at least seven days before the hearing; or
 - c. If with reasonable diligence a party cannot be served by mail or personal service, by publication of a notice published as a class 1 notice under [Wis. Stat.](#) ch. 985.

NOTE: All [Wis. Stat.](#) ch. 48 guardianships use Wisconsin circuit court form JD-1825, Affidavit of Service.

6. Under [Wis. Stat.](#) § 54.38(1), notice may be delivered
- a. In person,
 - b. By certified mail with return receipt requested, or
 - c. By facsimile transmission.

Notice is considered to be given by proof of personal delivery or by proof that the notice was mailed to the last-known address of the recipient or was sent by facsimile transmission to the last-known facsimile transmission number of the recipient. (Wisconsin circuit court form GN-3122, Affidavit of Service.)

D. Appointment of Guardian ad Litem; Right to Counsel [§ 19.817]

See [Wis. Stat.](#) §§ 48.9795(3)(a), 54.42(1), 48.235(1)(c), (3)(a), 48.23(3).

1. Court must appoint GAL for proposed minor in a [Wis. Stat.](#) §§ 48.977 and 48.9795 or ch. 54 guardianship proceeding (see also discussion of duties of GAL in section [19.15](#), *supra*, and in section [19.33](#), *infra*).
2. Court has the discretion to appoint advocacy counsel for the proposed minor in a [Wis. Stat.](#) §§ 48.977 and 48.9795 or ch. 54 guardianship proceeding, if requested. [Wis. Stat.](#) §§ 48.23(3), 54.42(1).
3. If a GAL determines that the best interests of the child are substantially inconsistent with the child's wishes, the GAL must inform the court and the court may appoint adversary counsel. [Wis. Stat.](#) § 48.235(3)(a).
4. If a GAL and adversary counsel are both appointed for an individual, adversary counsel must be allowed to represent client's expressed wishes even if in conflict with GAL's recommendation. *E.H. v. Milwaukee Cnty. (In the Int. of T.L.)*, 151 Wis. 2d 725 (Ct. App. 1989).

5. Duly appointed legal guardian may represent ward in legal matters but must *not* deny minor referral to legal counsel. [Wis. Stat.](#) § 48.023.

E. Initial Hearing on [Wis. Stat.](#) § 48.9795 Petition [§ 19.818]

1. A petition for full, temporary, and limited minor guardianships must be heard within 45 days after it is filed. [Wis. Stat.](#) § 48.9795(4)(e)1. A hearing on an emergency guardianship must be held as soon as possible, and a temporary order appointing an emergency guardian can be issued until the hearing is held. [Wis. Stat.](#) § 48.9795(6)(b)4.
2. At the initial hearing, the court must first determine whether any party wishes to contest the petition. If the petition is not contested, the court must immediately proceed to a fact-finding and dispositional hearing, unless an adjournment is requested. If the petition is contested and all parties consent, the court may proceed immediately to a fact-finding and dispositional hearing. If any party does not consent or if an adjournment is requested, the court must set a date for a fact-finding and dispositional hearing that allows reasonable time for the parties to prepare but is not more than 30 days after the initial hearing. [Wis. Stat.](#) § 48.9795(4)(e)1.

NOTE: The timelines under [Wis. Stat.](#) § 48.9795(4)(e)1. are mandatory, but the court can permit delays, continuances, and extensions pursuant to [Wis. Stat.](#) § 48.315(1). Hearings can be adjourned for good cause.

3. The proposed guardian and any proposed successor guardian of the person and estate must be physically present at all hearings unless the court excuses the attendance of either or, for good cause shown, permits attendance by telephone. The child is not required to attend any hearings, but if the child has nominated the proposed guardian, the child must provide to the guardian ad litem sufficient information for the guardian ad litem to advise the court on whether the nomination is in the best interests of the child. [Wis. Stat.](#) §§ 48.9795(4)(e)2., 54.44(3)(a), (4)(b).
4. A hearing on the petition in a [Wis. Stat.](#) § 48.977 guardianship must be heard no more than 30 days after it is filed. If the petition is contested, the court must then set a fact-finding hearing no more than 30 days after the date of the plea hearing. [Wis. Stat.](#) § 48.977(4)(cm).
5. The proposed guardian in a [Wis. Stat.](#) § 48.9795 case must attend all hearings in person and must provide a sworn and notarized Statement by Proposed Guardian at least 96 hours before the initial hearing setting forth the requirements in [Wis. Stat.](#) § 48.9795(4)(d).
6. If all parties agree, the court may proceed directly from the initial hearing to the fact-finding hearing. If a party objects or requests an adjournment, the court must schedule the hearing “not more than 30 days after the initial hearing.” [Wis. Stat.](#) § 48.9795(4)(e)1.

NOTE: Circuit court commissioners have the authority to hear *uncontested* guardianship matters under [Wis. Stat.](#) § 48.9795. There is no right to a jury trial in these cases. The statutes are silent on the right to judicial substitution in a [Wis. Stat.](#) § 48.9795 case, but [Wis. Stat.](#) § 48.29 also does not exclude these cases so judicial substitution likely is available. In practice, counties might defer to the judges to determine this issue. [Wis. Stat.](#) § 48.29 was amended by supreme court order in 2021 to eliminate the need to provide a written copy of the substitution request to the judge. The substitution-of-judge provision in [Wis. Stat.](#) § 801.58 does not apply; a specific statute on this procedure applies to [Wis. Stat.](#) ch. 48 cases. *Brown Cnty. Dep’t of Hum. Servs. v. Terrance M. (In re Termination of Parental Rts. to Genesis M.)*, 2005 WI App

57, 280 Wis. 2d 396.

7. The elements of the petition must be proved by clear and convincing evidence. [Wis. Stat.](#) § 48.9795(4)(f).
8. Pursuant to [Wis. Stat.](#) § 48.9795(4)(g), the court will move immediately to disposition. *See infra* § [19.34](#).
9. A petition for minor guardianship of the estate must be heard within 90 days. *See supra* § [19.8](#).

F. Guardian ad Litem Duties and Obligations in [Wis. Stat.](#) § 48.9795 Guardianships [§ 19.819]

See [Wis. Stat.](#) §§ 48.9795(3)(b), (c), 48.235(3).

1. Pursuant to [Wis. Stat.](#) § 48.9795(3)(b) and (c), GAL must conduct a diligent investigation “appropriate to the circumstances of the case,” which may include
 - a. Personally, or through a trained designee, meeting with the child, proposed guardian, or other interested persons;
 - b. Visiting the home of child, guardian, or both; and
 - c. Meeting or speaking with the interested persons.
2. GAL must inspect reports and records relating to the child’s family and proposed guardian to the extent those reports and records are necessary to a diligent investigation. [Wis. Stat.](#) § 48.9795(3)(b); see Order Appointing GAL or Attorney, JD-1798.
3. Report of the Guardian ad Litem, JN-1514 is available to provide information on GAL duties, wishes of the child, and recommendations.
4. GAL must make “clear and specific recommendations to the court at every stage of the proceedings.” [Wis. Stat.](#) § 48.9795(3)(b).
5. The following requirements are mandatory under [Wis. Stat.](#) §§ 48.9795(3)(b) and (c) and 48.235(3):
 - a. Attend all hearings relating to the guardianship;
 - b. Present evidence concerning and be an advocate for the best interests of the child;
 - c. Be an advocate for the best interests of the child;
 - d. Function independently in the same manner as an attorney for a party;
 - e. Make clear and specific recommendations to the court at every stage of the proceedings; and
 - f. To the extent necessary and to complete a diligent investigation, inspect reports and records relating to the child.

6. A GAL must be appointed in an emergency guardianship matter. Appointment should occur before a temporary order for emergency guardianship is issued, but if court finds exigent circumstances exist, it may issue the order and then appoint a GAL. [Wis. Stat. § 48.9795\(6\)\(b\)3](#). Once appointed, the GAL must conduct a diligent investigation and may petition for reconsideration or modification of the order. [Wis. Stat. § 48.9795\(6\)\(b\)3](#), 5.

G. Fact-Finding and Dispositional Hearings [§ 19.820]

1. Fact-finding hearings and elements of [Wis. Stat. § 48.9795](#) guardianships
 - a. If there is an objection at the initial guardianship hearing, the court may move immediately to a fact-finding hearing or set one within 30 days after the initial hearing. [Wis. Stat. § 48.9795\(4\)\(e\)1](#).

NOTE: In some counties the initial hearing might be held in front of a court commissioner, so a contested fact-finding hearing will not be heard the same day because it can be held only in front of a judge.

- b. Full guardianship
 - (1) Proof required under a full guardianship must meet the *Barstad* standard and requires that facts establish that the child's parent or parents are "unfit, unwilling, or unable to provide for the care, custody and control of the child or other compelling facts and circumstances demonstrating that a full guardianship is necessary." [Wis. Stat. § 48.9795\(4\)\(b\)4](#); *Barstad v. Frazier*, 118 Wis. 2d 549 (1984).
 - (2) The guardian is granted all duties and authority under [Wis. Stat. § 48.023](#) (similar to a [Wis. Stat. § 48.977](#) guardianship) to make important decisions in matters that will have a permanent effect on the life and development of the child, including but not limited to duty to be concerned about child's general welfare, authority to determine reasonable visitation, right to change child's residence from one state to another state, and duty to immediately notify the court of any change of address
 - (3) Guardian is required to file an annual report regarding the condition of the child. Report must include the child's location, the child's health condition, and any recommendations regarding the child. *See* Wisconsin circuit court form JN-1550.
- c. Limited guardianship
 - (1) A petition under this provision does not need to meet the standard for the full guardianship (*Barstad* standard). Petition should allege that "the child's parents need assistance in providing for the care, custody, and control of the child." [Wis. Stat. §§ 48.9795\(4\)\(b\)5](#), 48.023.
 - (2) Limits the duties and authority of a full guardianship.
 - (3) The child's parents need assistance in providing for the care, custody, and control of the child.
 - (4) Requires an expiration date.

-
- (5) Limited guardianships can be extended.
 - (6) Court has discretion to require filing of annual report regarding the condition of the child.
 - (7) Can be used for private TPRs until adoption is finalized.
 - (8) The court may limit the guardian's authority as follows:
 - (a) Allowing a parent to retain power to make certain decisions that the parent can exercise effectively.
 - (b) Limiting guardian's physical custody to allow shared physical custody between the guardian and the parent if shared custody is in the best interest of the child.
- d. Temporary guardianship
- (1) Petition should allege the "inability of the child's parents to provide for the care, custody, and control of the child for a temporary period of time." [Wis. Stat. § 48.9795\(4\)\(b\)6](#).
 - (2) Guardian's authority must be limited to those acts that are reasonably related to the reasons for the appointment that are specified in the petition for temporary guardianship.
 - (3) Temporary guardianship cannot exceed 180 days.
 - (4) One-time extension up to an additional 180 days.
 - (5) Authority can be granted for a shorter period of time.
 - (6) Examples of situations when temporary guardianship might be appropriate include a parent who has a health condition, is scheduled for surgery and anticipates a long recovery, or has received a short incarceration sentence.
- e. Emergency guardianship
- (1) Petitioner must demonstrate that the welfare of the child requires the immediate appointment of an emergency guardian. [Wis. Stat. § 48.9795\(4\)\(b\)7](#). If the court determines the welfare of the child does not require the immediate appointment of an emergency guardian, the court may dismiss the petition. [Wis. Stat. § 48.9795\(6\)\(b\)6](#).
 - (2) A hearing on the petition must be held as soon as possible after the petition has been filed. A temporary order appointing an emergency guardian may be requested on the petition (Wisconsin circuit court form JN-1504). For good cause shown, the request may be granted and the court may issue a temporary order appointing an emergency guardian without a hearing; the order will remain in effect until the hearing is held on the emergency guardianship petition. [Wis. Stat. § 48.9795\(6\)\(b\)4](#).

- (3) An emergency guardian's authority is limited to acts reasonably related to the reasons for the emergency guardian's appointment.
- (4) Emergency guardianships cannot exceed 60 days and cannot be extended. [Wis. Stat. § 48.9795\(6\)\(a\)](#). Any interested person or person granted leave of court may petition for reconsideration or modification of the emergency guardianship order, and court must hold a hearing within 30 days. [Wis. Stat. § 48.9795\(6\)\(b\)6](#).
- (5) Examples include situations when consent for health care is required but a parent is unavailable, a parent desires to remove child from a proposed guardian, or other circumstances necessitate an immediate guardian for less than 60 days.

NOTE: ICWA findings related to serious damage (qualified expert witness testimony), active efforts, and placement preferences are required for full, limited, or temporary guardianships. An emergency guardianship only requires an imminent harm finding. All required ICWA findings are listed on the IW forms. [Wis. Stat. § 48.9795\(4\)\(b\)10.–11](#).

2. Nomination of guardian of person

See [Wis. Stat. § 48.9795\(2\)\(c\)](#).

a. Nomination by parent or child

- (1) A parent may nominate a guardian and successor guardian including by will. Subject to the rights of a surviving parent, the court must appoint the person nominated as guardian or successor guardian, unless the court finds that appointment of the person nominated is not in the child's best interests. See Wisconsin circuit court form JN-1510.
- (2) A child 12 years of age or older may nominate his or her own guardian, unless a good reason exists for the court to do so. If neither parent of a child who has attained 12 years of age is fit, willing, and able to carry out the duties of a guardian, the court may appoint the child's nominee. See Wisconsin circuit court form JN-1510.
- (3) The court must consider the nominations of the parents and child and the opinions of the parents and child as to what is in the best interests of the child, but the best interests of the child as determined by the court must control in making the determination when the nominations and opinions are in conflict with the child's best interests.
- (4) At the conclusion of the dispositional hearing, if the court does not find the proposed guardian fit, willing, and able to serve as guardian, or if the court finds that the proposed guardian is not in the child's best interests, the court may adjourn the hearing for not more than 30 days to allow for the nomination of a new proposed guardian. [Wis. Stat. § 48.9795\(4\)\(i\)](#).

3. Nomination of guardian of estate

See [Wis. Stat. § 54.15](#).

- a. In determining who is appointed as guardian of the estate, a court must determine whether nominated guardian is suitable, *see Brezinski v. Barkholtz (In re Guardianship of Schmidt)*, 71 Wis. 2d 317 (1976), and must also consider the following factors:
 - (1) Opinions of the proposed ward and members of his or her family as to what is in the proposed ward's best interest, but the best interests must control when family opinions conflict. [Wis. Stat.](#) § 54.15(1).
 - (2) Nominations by a minor age 14 or over in writing in circuit court. [Wis. Stat.](#) § 54.15(4)(b).
 - (3) Court will appoint one or both parents if suitable and willing, if in ward's best interest. [Wis. Stat.](#) § 54.15(5).
 - (4) Nominations by parents by will, subject to the rights of surviving parents. [Wis. Stat.](#) § 54.15(6).
 - b. Court may appoint corporate guardian only if no suitable individual is available. [Wis. Stat.](#) § 54.15(7).
4. Dispositional factors for [Wis. Stat.](#) § 48.9795 guardianships
- a. If the court finds that the petitioner has met its burden and proved the allegations in the petition, the dispositional hearing must immediately follow the fact-finding hearing. In determining the appropriate disposition under [Wis. Stat.](#) § 48.9795(4)(h), the court must consider all the following ([Wis. Stat.](#) § 48.9795(4)(g)):
 - (1) Any nominations made under [Wis. Stat.](#) § 48.9795(2)(c)1. and the opinions of the parents and child as to what is in the best interests of the child, but the best interests of the child as determined by the court must take priority in making the determination when those nominations and opinions are in conflict with those best interests;
 - (2) Whether the proposed guardian would be fit, willing, and able to serve as the guardian of the child. Proposed guardians must file a statement at least 96 hours before the hearing on a full, limited, or temporary guardianship. (JN-1514);
 - (3) If the child is an Indian child, the order of placement preference under [Wis. Stat.](#) § 48.028(7)(b) or, if applicable, [Wis. Stat.](#) § 48.028(7)(c), unless the court finds good cause, as described in [Wis. Stat.](#) § 48.028(7)(e), for departing from the placement-preference order; and
 - (4) Whether appointment of the proposed guardian as the child's guardian is in the best interests of the child.

NOTE: The letters of guardianship and dispositional order are combined into one form, Wisconsin circuit court form JN/IW-1530. However, the emergency guardianship order, Wisconsin circuit court form JN-1521, is separate from the full, limited, or temporary orders.

Under any of the four guardianships, the court can order reasonable rules of visitation, an amount of support paid by the parents, or a successor guardian. None of the guardianships can

change placement of a child who is under the supervision of the court pursuant to [Wis. Stat.](#) ch. 48 or 938.

5. Notice of appointment to be given in minor guardianship of estate, *see* [Wis. Stat.](#) § 54.38(5). If not nominee of minor, guardian must
 - a. Give notice of appointment to minor by certified mail to last-known mailing address, and
 - b. File affidavit of mailing notice to minor with court within 10 days after letters issued.
6. Compensation of a minor guardian of estate is set forth in section [19.12](#), *supra*.
7. Standby guardian for [Wis. Stat.](#) § 48.978 guardianships and successor guardian for [Wis. Stat.](#) § 48.9795 guardianships
 - a. A petition for standby guardian must be brought under [Wis. Stat.](#) § 48.978 for guardians of the person and under [Wis. Stat.](#) § 54.54 for guardians of the estate.
 - b. A petition for successor guardian may be brought at the time of the filing of the initial guardianship using the petition, Wisconsin circuit court form JN-1501; or any time after appointment of the guardian by a request to modify guardianship, using Wisconsin circuit court form JN-1540. [Wis. Stat.](#) § 48.9795(8).

H. Post-Dispositional Proceedings [§ 19.821]

NOTE: Post-guardianship motions filed in [Wis. Stat.](#) ch. 54 guardianship-of-the-person cases must be conducted using [Wis. Stat.](#) § 48.9795 procedures. *See* 2019 Wis. Act 109, § 49.

1. Review of conduct of guardian
 - a. See sections [19.64–70](#), *infra*, for discussion of removing guardian for cause or reviewing guardian’s conduct for a guardian of the estate. [Wis. Stat.](#) § 54.68.
 - b. The court that appointed the guardian has “continuing jurisdiction” over the guardian of the person, including to review the guardian’s conduct. [Wis. Stat.](#) § 48.9795(10).
 - (1) Any interested person or other person approved by the court may file a petition requesting review of the guardian’s conduct. [Wis. Stat.](#) § 48.9795(10)(c). Interested persons are defined in [Wis. Stat.](#) § 48.9795(1)(a)2.
 - (2) Petitioner should use Form JN-1560 to initiate a review. A court will schedule a hearing within 30 days. [Wis. Stat.](#) § 48.9795(10)(c). Notice should be provided at least seven days before the hearing. *Id.*
 - (3) The standard of review is clear and convincing evidence. Under [Wis. Stat.](#) § 48.9795(10)(b), the court can order a remedy if a guardian does any of the following:
 - (a) Abuses or neglects the child or knowingly permits others to do so,

- (b) Fails to disclose information specified in [Wis. Stat.](#) § 48.9795(4)(d) that would have prevented appointment of the person as guardian,
 - (c) Fails to follow or comply with the court’s order, or
 - (d) Otherwise fails to perform any of his or her duties as a guardian under [Wis. Stat.](#) § 48.023.
- (4) Under [Wis. Stat.](#) § 48.9795(10)(d), remedies available if grounds are established are the following:
- (a) Removal of the guardian;
 - (b) Removal of the guardian and appointment of a successor guardian;
 - (c) Entry of any other order that might be necessary or appropriate to compel the guardian to carry out the guardian’s duties, including an order setting reasonable rules of visitation with the child, *see also infra* § [19.36](#);
 - (d) Modification of the duties and authority of the guardian; and
 - (e) If the court finds that the guardian’s conduct was egregious, require that the guardian pay any costs of the proceeding, including costs of service and attorney fees.
2. Request to modify or extend guardianship
- a. A request to modify an existing guardianship order is covered by [Wis. Stat.](#) § 48.9795(9) and the procedure for doing so is found in [Wis. Stat.](#) § 48.9795(9)(b) and (c). The standard for modifying a guardianship requires a showing of “substantial change in circumstances.” [Wis. Stat.](#) § 48.9795(9)(a). The petitioner must show proposed modification is in the best interests of the child. [Wis. Stat.](#) § 48.9795(9)(a), (c).
 - b. Any interested person may file a request to modify, extend, or terminate a guardianship using Wisconsin circuit court form JN-1540. “Interested person” is defined by [Wis. Stat.](#) § 48.9795(1)(a)2.
 - c. Each type of guardianship has different limitations for extensions.
 - (1) A full guardianship typically expires when the child reaches the age of 18. [Wis. Stat.](#) § 48.9795(11)(a)1. There is nothing statutorily that prevents the court from setting the length of the order to a “lesser period of time.” *Id.*
 - (2) A limited guardianship does not have a statutorily set period of time after which it expires, but “the court shall set an expiration date for a limited guardianship order.” Limited guardianships may be extended beyond the expiration date if good cause is shown. [Wis. Stat.](#) § 48.9795(2)(d)2.
 - (3) A temporary guardianship may “not exceed 180 days” but can be set for less. [Wis. Stat.](#) § 48.9795(5)(a). After that time expires, it may be set for one additional period of 180 days. *Id.*

NOTE: Before the court extends the period of time for either a limited or a temporary guardianship, the petitioner must show “good cause” for the extension.

NOTE: Emergency guardianships have their own procedure under [Wis. Stat.](#) § 48.9795(6)(b)5. The court must hold a rehearing on the issue of appointment of the emergency guardian within 30 calendar days after the filing of the petition for reconsideration or modification.

3. Termination of guardianship
 - a. Guardianship of person terminates under [Wis. Stat.](#) § 48.9795(11)(a) on occurrence of any of the following:
 - (1) The guardianship is for a lesser period of time and that time has expired.
 - (2) The child marries.
 - (3) The child dies.
 - (4) The child’s residence changes from this state to another state and a guardian is appointed in the new state of residence.
 - (5) The guardian dies, or the guardian resigns and the resignation is accepted by the court, and a successor guardian is not appointed.
 - (6) The guardian is removed for cause under [Wis. Stat.](#) § 48.9795(10)(d)1. and a successor guardian is not appointed.
 - (7) The court terminates the guardianship on the request of a parent of the child or the child under [Wis. Stat.](#) § 48.9795(11)(b).
 - (8) The court terminates the guardianship upon the adoption of the child.
 - b. [Wis. Stat.](#) § 48.9795(11)(b) allows a parent or child to petition the court to terminate a guardianship. The procedure is available in full, temporary, limited, successor, or emergency guardianships. [Wis. Stat.](#) § 48.9795(11)(b)1.
 - c. Under [Wis. Stat.](#) § 48.9795(11)(b)1., a petition to terminate must allege facts sufficient to show all the following:
 - (1) There has been a substantial change of circumstances since the last order affecting guardianship was entered.
 - (2) The parent is fit, willing, and able to carry out the duties of guardian.
 - (3) No compelling facts of circumstances exist demonstrating that a guardianship is necessary.
 - (4) Termination of the guardianship would be in the best interests of the child.

- d. The burden of proof in a termination petition is “preponderance of the evidence,” which is a lower standard than in the other guardianship proceedings. [Wis. Stat.](#) § 48.9795(11)(b)3.
- e. The court must hold a hearing if a parent or child requests to terminate the guardianship. A hearing is not required if written waivers of objection are filed and approved by the court. [Wis. Stat.](#) § 48.9795(11)(b)2.
- f. Guardianship of estate terminates on occurrence of any of the following:
 - (1) Minor reaches age of majority, unless incompetent. [Wis. Stat.](#) § 54.64(4)(c).
 - (2) Minor lawfully marries, unless incompetent, and court approves termination. [Wis. Stat.](#) §§ 54.64(4)(d), 54.46(6).
 - (3) Ward changes residence from Wisconsin to another state and a guardian is appointed in new state of residence. [Wis. Stat.](#) § 54.64(4)(b).
 - (4) Minor dies. [Wis. Stat.](#) § 54.64(4)(e).
 - (5) See section [19.68](#), *infra*, for termination of guardianship when minor is incompetent.

I. Visitation by a Child’s Grandparents and Stepparents [§ 19.822]

1. If one or both parents are deceased, grandparents or stepparents may petition for visitation even if the person with custody is married. [Wis. Stat.](#) § 48.9795(12); *H.F. v. T.F. (In re Grandparental Visitation of C.G.F.)*, 168 Wis. 2d 62 (1992).
2. Court may grant reasonable visitation privileges to the grandparent or stepparent if the custodian of the child has notice of the hearing and visitation is in the best interests of the minor. [Wis. Stat.](#) § 48.9795(12).
3. The grandparent or stepparent may file the petition in a guardianship proceeding under [Wis. Stat.](#) § 48.9795 that affects the child or may file the petition to commence an independent action under [Wis. Stat.](#) § 48.9795(12). There is no standard circuit court form for petitioning under [Wis. Stat.](#) § 48.9795.
4. Court may grant reasonable visitation even if child is later adopted if in the child’s best interests and other factors are considered. [Wis. Stat.](#) § 48.925.
5. Circuit court’s discretionary determination as to visitation will be affirmed as long as court examines relevant facts, applies proper legal standard, and uses demonstrated rationale to reach conclusions that reasonable judge could reach. Court, whenever possible, should consider wishes of minor child. [Wis. Stat.](#) §§ 767.43, 48.9795(12); *F.R. v. T.B. (In re Visitation of Z.E.R.)*, 225 Wis. 2d 628 (Ct. App. 1999).

NOTE: Circuit courts determining special grandparental visitation rights under [Wis. Stat.](#) § 767.43(3) must apply the presumption that a fit parent’s decision regarding grandparental visitation is in the best interest of the child; however, this is a rebuttable presumption, and the circuit courts are obligated to consider the particular facts of each case. *Roger D.H. v. Virginia O. (In re Paternity of Roger D.H.)*, 2002 WI App 35, 250 Wis. 2d 747.

[Wis. Stat.](#) § 767.43(1) also governs visitation rights of third parties and allows a “grandparent, great grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child” to petition the court for visitation if notice is given and visitation is in the best interest of the child. In *S.A.M. v. Meister*, 2016 WI 22, 367 Wis. 2d 447, the Wisconsin Supreme Court reversed the court of appeals and ruled that persons other than a grandparent, great grandparent, or stepparent must prove the parent-child relationship. The court further clarified that “any best interest determination must give special weight to a fit parent’s decisions regarding the child’s best interest.” *Id.* ¶ 6.

The Wisconsin Supreme Court upheld [Wis. Stat.](#) § 767.43(3) as facially constitutional in *Michels v. Lyons (In re Grandparental Visitation of A.A.L.)*, 2019 WI 57, 387 Wis. 2d 1. However, the supreme court held that the statute was unconstitutional as applied in *Michels* because the grandparent “did not overcome the presumption in favor of [the parents’] visitation decision with clear and convincing evidence that their decision is not in [their child’s] best interest.” *Id.* ¶ 41. The supreme court cautioned judges not to substitute their judgment for a fit parent’s decision on visitation even if the judge disagrees with the parent’s decision. These principles apply in all third-party visitation cases in addition to the requirements set forth in the statutes. Attorneys should consider this decision before moving for any third-party visitation.

6. Guardian’s authority over visitation

[Wis. Stat.](#) § 48.023(3) sets forth one of the duties of the guardian as the “right and duty of reasonable visitation of the child.” [Wis. Stat.](#) § 48.9795(2(d)1.b., further grants guardians “the authority to determine reasonable visitation” with the child with others. A guardian’s decision in this regard is presumed to be in the child’s best interests. [Wis. Stat.](#) § 48.9795(4)(h)2.c. If the court reviews such a decision, the petitioner has the burden to prove by clear and convincing evidence that the decision is not in the child’s best interests. *Id.*

J. Guardian’s Rights with Respect to Injuries to Minor Ward [§ 19.823]

A guardian cannot recover for loss of society and companionship of a ward and cannot maintain a separate claim for costs incurred or income lost on account of injuries to the ward. *Conant v. Physicians Plus Med. Grp., Inc.*, 229 Wis. 2d 271 (Ct. App. 1999).

K. Support Issues [§ 19.824]

At disposition, the court may enter in the order an amount of support to be paid by the parent or parents. See Wisconsin circuit court Forms JN-1530; IW-1530; JN-1521. Issuance and implementation of these support orders vary among counties.

VI. PROCEDURE TO SECURE GUARDIANSHIP OF INCOMPETENT PERSONS [§ 19.825]

A. In General [§ 19.826]

1. Under [Wis. Stat.](#) § 54.10(3), court may appoint guardian of person or estate or both only if
 - a. Proposed ward is at least 17 years, 9 months old; and

- b. Proposed ward has an impairment that makes him or her incapable of effectively receiving and evaluating information needed to make or communicate decisions to meet requirements for physical health and safety and management of the ward's property and financial affairs.
2. [Wis. Stat.](#) § 54.01(14) provides that an individual found incompetent is a person who is substantially incapable of managing property or caring for self by reason of any of the following impairments:
 - a. Serious and persistent mental illness, [Wis. Stat.](#) § 54.01(30);
 - b. Degenerative brain disorder, [Wis. Stat.](#) § 54.01(6); *Shawano Cnty. v. Velma M. (In re Guardianship and Protective Placement of Velma M.)*, No. 2011AP2715, 2012 WL 3569254 (Wis. Ct. App. Aug. 21, 2012) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b));
 - c. Developmental disability, [Wis. Stat.](#) § 54.01(8); or
 - d. Other like incapacities (which may include conditions incurred at any age as a result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances that substantially impair ability to provide for own care and custody), [Wis. Stat.](#) § 54.01(22).

NOTE: Unless proposed ward is unable to communicate decisions effectively in any way, determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or the existence of a supported decision-making agreement. [Wis. Stat.](#) § 54.10(3)(b). However, a court may consider whether poor judgment that has been shown was the product of an impairment, such as a serious and persistent mental illness. *Dodge Cnty. v. L.W. (In re Guardianship of L.W.)*, No. 2020AP1754, 2021 WL 3673233, ¶ 15 (Wis. Ct. App. Aug. 19, 2021) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied).

3. May have guardian of person, guardian of estate, limited guardian of person, limited guardian of estate, or any combination of categories of guardianship.
4. Court need not appoint guardian of estate when personal property is valued at the amount specified in [Wis. Stat.](#) § 867.03(1g) (\$50,000 or less), but instead, under [Wis. Stat.](#) § 54.12, can order register in probate to do the following:
 - a. Deposit funds in interest-bearing, insured account; or
 - b. Make payment to incompetent person's custodian, agent under durable power of attorney, or trust for the ward's benefit.
5. When transferring a guardianship to or from another state, [Wis. Stat.](#) ch. 53 applies to the process of determining jurisdiction and is intended to supplement rather than replace the procedures for petitioning for that court order additional medical, psychological, or other evaluation and guardianship or protective placement or services as set forth in [Wis. Stat.](#) chs. 54 and 55. If there is a conflict between the procedures in [Wis. Stat.](#) ch. 53 and those in [Wis. Stat.](#) chs. 54 and 55, the latter chapters will supersede [Wis. Stat.](#) ch. 53. See [Wis. Stat.](#) § 53.01; see also *infra* §§ [19.104–111](#).

B. Notice of Guardianship Hearing [§ 19.827]

See [Wis. Stat.](#) § 54.38.

1. Except as to the proposed ward, notice must be in writing and unless otherwise provided may be given in person, by certified mail with return receipt requested, or by fax. Notice is considered to be given by proof of personal delivery, mail delivery to last-known address, or fax delivery to last-known fax number.
2. Notice must contain the following:
 - a. Time and place of hearing,
 - b. Names of persons petitioning for guardianship,
 - c. Specific allegations of grounds of incompetency, and
 - d. Physical copy of petition.
3. Under [Wis. Stat.](#) § 54.38(2), notice must be served on
 - a. Proposed ward personally;
 - b. Legal counsel;
 - c. GAL;
 - d. Presumptive adult heirs or other persons who have legal or physical custody of the proposed ward whose names and addresses are known to petitioner or can with reasonable diligence be ascertained;
 - e. Any agency, charity, or foundation from which proposed ward is receiving aid or assistance;
 - f. Proposed guardian;
 - g. Any other “interested persons,” as defined in [Wis. Stat.](#) § 54.01(17)(a), unless specifically waived by court;
 - h. Agent under any durable financial power of attorney or power of attorney for health care for ward; and
 - i. Anyone else court requires.

NOTE: Area office of U.S. Department of Veterans Affairs if proposed ward’s assets are derived in whole or in part from past benefits or if ward may be eligible to receive future benefits paid by the department. [Wis. Stat.](#) § 54.852(2).

4. Copy of petition and order for hearing may be filed with register of deeds, and all contracts, gifts, etc., made by ward after filing may, on application of guardian, be voided. Order must include a finding that the ward may not make contracts. [Wis. Stat.](#) § 54.47.

NOTE: In limited guardianship, contracts are void only if the court determines that the person cannot make contracts. The ward's right to contract is a new finding on the Determination and Order on Petition for Guardianship Due to Incompetency (Wisconsin circuit court form GN-3170) and Letters of Guardianship of Estate (Wisconsin circuit court form GN-3210), which were updated in 2021.

5. Method of service

- a. Proposed ward must be served personally at least 10 working days before hearing. [Wis. Stat.](#) § 54.38(2)(a).
- b. If proposed ward is in custody or in confinement, notice must be served by certified mail on custodian, who must serve it on proposed ward.

NOTE: The custodian certifies service and returns the certificate and notice to the judge.

- c. Service of notice on office of U.S. Department of Veterans Affairs, if required, must be by mail (*unless waived in writing*) 15 working days before hearing. [Wis. Stat.](#) § 54.852(2)(b).
- d. All others served personally or by mail at least 10 working days before hearing. [Wis. Stat.](#) § 54.38(2)(b).

C. Right to Counsel [§ 19.828]

1. Court will appoint attorney to serve as GAL for proposed ward and, if county is ordered to pay GAL, fees may not exceed compensation paid to private counsel under [Wis. Stat.](#) § 977.08. [Wis. Stat.](#) §§ 54.42(1)(c), 757.48(1)(a), (b).
2. In addition, proposed ward has right to court-appointed counsel. Under [Wis. Stat.](#) §§ 54.42(1)(a) and 977.08(4m), in all contested cases, court *must ensure* that proposed ward is represented by legal counsel in following circumstances:
 - a. On proposed ward's request,
 - b. If GAL or other person states proposed ward's opposition to guardianship petition, or
 - c. If court determines that justice so requires.
3. If proposed ward requests but is unable to obtain legal counsel, court will appoint counsel under [Wis. Stat.](#) § 977.08. [Wis. Stat.](#) § 54.42(1).
4. If proposed ward is indigent and if counsel not appointed under [Wis. Stat.](#) § 977.08, county will be responsible for fees owed to person's legal counsel. [Wis. Stat.](#) § 54.46(3)(b).

NOTE: Per-hour fees are established for private local attorneys appointed by the court for time spent on a case, in court or out of court, other than travel, and for travel time if the travel

required is more than 30 miles one way from the attorney's principal office or if any part of the trip is outside of the county of the attorney's principal office. Check actual amounts with the clerk of court for children's court or the register in probate of the county. [Wis. Stat. § 977.08\(4m\)\(c\)](#).

5. Ward is entitled to reasonable expenses incurred in contesting appointment to be paid out of guardianship estate. [Wis. Stat. § 54.42\(4\)](#).
6. Right to counsel includes right to effective counsel. *A.S. v. State (In the Int. of M.D.(S))*, 168 Wis. 2d 995 (1992).
7. Attorney must be aware of conflicts of interest and perceptions of conflict of interest and must be aware that incompetent person or proposed ward cannot waive such conflicts; attorney may be disqualified even if no actual conflict exists, as long as there is possibility of conflict. *Guerrero v. Cavey (In re Guardianship & Protective Placement of Lillian P.)*, 2000 WI App 203, 238 Wis. 2d 449.

D. Duties of Guardian ad Litem [§ 19.829]

See [Wis. Stat. §§ 54.42\(1\)\(a\), 54.40\(4\)](#).

1. Conduct personal interview with proposed ward that includes all the following:
 - a. Explanation of contents of petition,
 - b. Explanation of hearing procedures,
 - c. Information regarding right to counsel, and
 - d. Right to request or continue a limited guardianship.

NOTE: When a ward is represented by adversary counsel, the GAL cannot interview the ward outside the counsel's presence. *Jennifer M. v. Maurer (In re Guardianship of Jennifer M.)*, 2010 WI App 8, 323 Wis. 2d 126.

2. Provide proposed ward with oral and written notice of rights to all the following:
 - a. Jury trial if requested by
 - (1) Ward,
 - (2) Attorney, or
 - (3) GAL.
 - b. Appeal.
 - c. Counsel and rights to present evidence, including medical and psychological evidence, and cross-examine witnesses; and

- d. Independent medical or psychological exam, at county expense if person is indigent.
3. Request that court order additional medical, psychological, or other evaluation and testimony if appropriate.
4. Interview proposed guardian and standby guardian (if any) and report to court regarding suitability.
5. Review advance-planning documents and interview any agent appointed by proposed ward in those documents and report to court regarding adequacy of documents and agent.
6. Inform court and petitioner or petitioner's counsel, if any, if proposed ward requests representation by counsel.
7. Notify guardian of rights to be present at and participate in hearing, to present and cross-examine witnesses, to receive copy of any evaluation under [Wis. Stat.](#) § 55.11(1) or (2), and to present an independent examination under [Wis. Stat.](#) § 54.42(3).
8. If applicable, inform court and petitioner's attorney or, if none, petitioner that ward or proposed ward objects to finding of incompetency, the present or proposed placement, or GAL's recommendation as to ward's best interests or that ward's position on these matters is ambiguous.
9. If ward or proposed ward requests representation by counsel, inform court and petitioner or petitioner's counsel, if any.
10. Attend all court proceedings related to the guardianship.
11. Present evidence concerning best interests of proposed ward.
12. Report to court on any matter requested by court.

E. Evaluation of Competency [§ 19.830]

See [Wis. Stat.](#) § 54.36.

1. Written report
 - a. [Wis. Stat.](#) § 54.36 provides that written report concerning any medical or other condition causing the proposed ward to be incompetent or be a spendthrift person, based on examination, must be furnished to court by one of the following:
 - (1) Licensed physician,
 - (2) Licensed psychologist, or
 - (3) Licensed physician and licensed psychologist.

NOTE: Most counties use a standard form for the examining physician or psychologist's report. See, e.g., Examining Physician's or Psychologist's Report, Wisconsin circuit court

Form GN-3130. Courts may differ as to the required contents of the examiner's statement (may request IQ, level of functioning, and other specifics). At a minimum, the statement should contain a complete, accurate diagnosis of the proposed ward's mental condition, the likelihood of the condition being permanent, and reasons why a guardian is required. It helps to supply questions to be answered by examiner. *Dodge Cnty. v. L.W. (In re Guardianship of L.W.)*, No. 2020AP1754, 2021 WL 3673233, ¶¶ 9–11 (Wis. Ct. App. Aug. 19, 2021) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied).

Physician-patient privilege will not apply to written statement concerning ward's mental condition; statute provides that there is no physician-patient privilege as to information concerning patient's mental condition as described in statement furnished to court by a physician or psychologist under [Wis. Stat.](#) § 54.36. [Wis. Stat.](#) § 905.04(4)(a), (am).

- b. Proposed ward must be informed of right to remain silent and that examiner must report to court.
- c. Issuance of warning establishes presumption that person understands right to be silent.
- d. Court may order proposed ward to submit to examination on petition of GAL or petitioning attorney. [Wis. Stat.](#) § 54.36(2).
- e. Written report states professional opinion of physician or psychologist with respect to presence and likely duration of medical (or other) condition resulting in proposed ward's incompetence or being a spendthrift person.
- f. Under [Wis. Stat.](#) §§ 54.36 and 54.44(1), at least 96 working hours before hearing, a copy of report must be provided to all the following:
 - (1) Petitioner and petitioner's counsel.
 - (2) Proposed ward's attorney (if ward is indigent, court must appoint attorney to represent ward under [Wis. Stat.](#) § 977.08). [Wis. Stat.](#) § 977.08.
 - (3) GAL.

NOTE: Although generally not required, it is good practice to also serve proposed ward (Milwaukee County *requires* service on proposed ward).

- g. Report is not evidence unless examiner testifies and is subjected to cross-examination.

NOTE: The examining psychologist's written report *is not admissible* in a contested hearing as an exception to the hearsay rule. The legislature did not intend that the written statement of a physician or psychologist (hearsay) be admissible without the *in-court* testimony of the person who prepared it. *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, 162 Wis. 2d 197 (1991).

- (1) In an uncontested hearing, examining expert's report is admissible by stipulation of the parties; interested parties who fail to exercise their rights to object to such a report in a timely manner cannot later object to a finding based on the report. *Coston*

v. Joseph P. (In re Guardianship & Conservatorship of Joseph P.), 222 Wis. 2d 1 (Ct. App. 1998).

- (2) Ward is entitled to full due process, but in weighing competing expert opinions, the court has the regulated duty to determine credibility of witnesses. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, 2003 WI App 223, 267 Wis. 2d 310; *see also Dodge Cnty. v. L.W. (In re Guardianship of L.W.)*, No. 2020AP1754, 2021 WL 3673233 (Wis. Ct. App. Aug. 19, 2021) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied); *J.W. v. R.B. (In re Guardianship of R.B.)*, No. 2019AP197, 2020 WL 3669799 (Wis. Ct. App. July 7, 2020) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied).

PRACTICE TIP: In contested matters, the examiner is almost always called as an expert witness. Taking the expert's oral testimony as well as *entering* into evidence the examining physician's report is best practice to prepare for the possibility that a finding of incompetency is later appealed. *In re Guardianship of L.W.*, 2021 WL 3673233, ¶¶ 9–11.

- h. Proposed ward has right to provide independent medical or psychological examination, at county expense, if proposed ward is indigent. [Wis. Stat.](#) § 54.42(3).
- i. In case of limited incompetency, court will determine whether additional medical or psychological testimony is necessary to determine extent of limitation. [Wis. Stat.](#) § 54.10(3)(d).
- (1) Court may obtain assistance as provided in [Wis. Stat.](#) § 55.11.
- (2) Court can use available multidisciplinary resources.
- j. Courts now favor limited guardianship; the limitations of a guardianship will be as ordered by the court, and the court will make specific findings as to which, if any, legal rights the ward may retain. [Wis. Stat.](#) § 54.18.

NOTE: In recent years, courts have taken the question of the ward's capacity to vote very seriously, to the point that courts assume the ward has the requisite capacity to understand the objective of the elective process unless there is clear and convincing evidence to the contrary. [Wis. Stat.](#) § 54.25(c)(4). It is common that during annual reviews, guardianship orders are amended to return to wards the right to vote.

2. Hearing

- a. Proposed ward or ward must attend hearing if able. [Wis. Stat.](#) § 54.44(4).
- (1) Proposed ward or ward is presumed able to attend.
- (2) GAL can waive ward's appearance.
- (3) After personal interview with proposed ward, GAL may certify in writing to court specific reasons why proposed ward or ward is unable to attend. *See Report of Guardian ad Litem Guardianship Due to Incompetency (Adult Guardianship)*,

Wisconsin circuit court form GN-3160; Report and Recommendation of Guardian ad Litem (Annual Review), Wisconsin circuit court form GN-4110.

- (4) Petitioner has an affirmative burden to produce the proposed ward unless doing so is impossible; failure by petitioner to take affirmative steps to produce ward will result in loss of jurisdiction to decide case. [Wis. Stat.](#) § 54.44(4)(a); see *Knight v. Milwaukee Cnty. (In re Guardianship & Protective Placement of Muriel K.)*, 2002 WI App 194, 256 Wis. 2d 1000.
 - (5) On request of ward, GAL, advocate counsel, or interested person, court will hold hearing at a place where proposed ward or ward may attend if proposed ward is otherwise unable to attend because of residency in nursing home or other facility, court is not physically accessible, or ward lacks transportation. [Wis. Stat.](#) § 54.44(4).
- b. Counties differ with respect to requiring attendance.
 - c. A minor proposed ward or ward is not required to attend hearing. [Wis. Stat.](#) § 54.44(4)(b).
3. Due process
 - a. If jury trial is desired, demand must be made at least 48 hours before hearing. [Wis. Stat.](#) § 54.42(2).
 - (1) Jury of six persons unless party requests greater number, not to exceed 12. [Wis. Stat.](#) § 756.06(2)(b).
 - (2) On its own motion, court can order greater number, not to exceed 12.
 - b. Proposed ward has right to present and cross-examine witnesses and hearing must be in accessible location. [Wis. Stat.](#) § 54.42(2), (6).
 - c. Proposed ward has right to appeal court's final decision. [Wis. Stat.](#) § 54.40(4)(b).
 - d. Ward has right to independent examination. [Wis. Stat.](#) § 54.42(3).
 4. Standard of proof
 - a. Clear and convincing evidence that proposed ward or ward is incompetent. [Wis. Stat.](#) § 54.44(2).
 - (1) Party seeking guardianship has burden of proof. *Colliton v. Colliton (In re Guardianship of Colliton)*, 41 Wis. 2d 487 (1969).
 - (2) Under [Wis. Stat.](#) § 54.10(3)(c), court must consider a variety of factors, including the following:
 - (a) GAL report;
 - (b) Expert testimony;

- (c) The preferences, desires, and values of the proposed ward with regard to personal needs or property management;
 - (d) Whether the proposed ward's situation places him or her at risk of abuse, exploitation, neglect, or violation of rights;
 - (e) The proposed ward's understanding and appreciation of the nature and consequences of any inability he or she may have with regard to personal needs or property management;
 - (f) Any medication with which the proposed ward is being treated and the medication's effect on the proposed ward's behavior, cognition, and judgment;
 - (g) Whether the effect on the proposed ward's evaluative capacity is likely to be temporary or long term, and whether the effect may be ameliorated by appropriate treatment; and
 - (h) Nature of estate, its complexity, and amount of judgment necessary to manage it.
- b. Best interests of proposed ward control. [Wis. Stat.](#) § 54.15(1).

NOTE: The court will consider the opinions of the proposed ward and family members, but in situations in which opinions conflict, the ward's best interests govern. The court will also consider whether potential conflicts of interest exist. If the proposed ward has executed a power of attorney for health care under [Wis. Stat.](#) ch. 155, the court will consider appointing the health-care agent as guardian.

- c. Unless the proposed ward is unable to communicate decisions effectively in any way, mere old age, eccentricity, poor judgment, physical disability, or existence of supported decision-making agreement is not sufficient. [Wis. Stat.](#) § 54.10(3)(b).
- d. Finding of incompetency is not grounds for involuntary protective placement; such placement may be made only in accordance with [Wis. Stat.](#) ch. 55. [Wis. Stat.](#) § 54.48.
- e. Appeal may be taken to court of appeals by proposed subject, guardian, or any person, within time specified in [Wis. Stat.](#) § 808.04(3) and in accordance with [Wis. Stat.](#) § 809.30. [Wis. Stat.](#) § 55.20.

5. Determination

- a. Court can find person competent and dismiss petition. [Wis. Stat.](#) § 54.46(1).
 - b. Court can find person incompetent and appoint guardian of person, guardian of estate, or both; court must specify any powers that require court approval, as provided in [Wis. Stat.](#) §§ 54.20(2) and 54.25(2). [Wis. Stat.](#) § 54.46(2).
- (1) Limited guardianship of person

- (a) Court order must determine limits and set forth specifically the legal rights (e.g., right to vote, marry, possess driver's license, testify, hold or convey property, make contracts) that person is competent to exercise. [Wis. Stat. § 54.10\(3\)\(e\)](#).

NOTE: Letters of limited guardianship should clearly set forth any limitations, as should the determination and order.

- (b) Court will determine whether additional medical or psychological testimony is necessary, *see supra* para. 1.f. [Wis. Stat. § 54.10\(3\)\(d\)](#).
- (c) Guardian, ward, or interested person may petition for restoration of ward's legal rights, stating reasons for restoration of right or rights involved, *see infra* § [19.66](#).

(2) Limited guardianship of estate

- (a) Court must determine which powers guardian of estate must exercise based on ward's needs and best interests. [Wis. Stat. § 54.10\(2\)\(b\)](#).

See list of 10 factors for court to consider in [Wis. Stat. § 54.10\(2\)\(b\)](#).

NOTE: The court may limit these rights as it determines to be in the person's best interests.

- (b) Decision should be consonant with least restrictive limitation of rights. [Wis. Stat. § 54.10\(3\)\(e\)](#).
- (c) Court must consider preferences and needs of ward and ward's ability to manage affairs. [Wis. Stat. § 54.10](#).
- (d) Guardian's powers are confined strictly to those powers set forth in court's order. *See* [Wis. Stat. § 54.18](#).

- c. Court may accept or dismiss a petition to receive and accept a foreign guardianship. Standard for receipt of foreign guardianship is set forth in statutes and case law. [Wis. Stat. ch. 53](#), *see infra* §§ [19.104-111](#), Wisconsin's version of the Uniform Adult Guardianship Jurisdiction Act, attempts to resolve potential conflicts between states regarding jurisdiction. [Wis. Stat. § 54.46\(1r\)](#); *Grant Cnty. Dep't of Soc. Servs. v. Unified Bd. (In re Guardianship of Jane E.P.)*, 2004 WI App 153, 275 Wis. 2d 680, *vacated and remanded*, 2005 WI 106, 283 Wis. 2d 258.
- d. All court records regarding finding of incompetency are closed but subject to access by the ward, attorney for ward, and GAL and to others by informed consent of ward or court order. Fact of incompetence and contact information for guardian are accessible to anyone who demonstrates to the record custodian the need for the records. [Wis. Stat. § 54.75](#).
- e. A finding of incompetency is not grounds for protective placement, which is made only under [Wis. Stat. ch. 55](#). [Wis. Stat. § 54.48](#).

VII. PERSONS NOT COMPETENT TO REFUSE PSYCHOTROPIC MEDICATION [§ 19.831]

A. In General [§ 19.832]

See [Wis. Stat.](#) § 55.14.

1. Before psychotropic medications can be involuntarily administered as a protective service by court order, the individual must be determined to be incompetent by a circuit court per a petition for guardianship. Frequently, the individual for whom the involuntary administration of psychotropic medication is necessary is not already under guardianship. The petition for guardianship must be filed along with a petition for involuntary administration of psychotropic medications; the court will hear both petitions at the same time. A standard form, GN-4171, to petition for involuntary administration of psychotropic medication is available. See [Wis. Stat.](#) § 55.075(3).

NOTE: This section only addresses the process for petitioning for involuntary administration of psychotropic medications; refer to sections [19.39–.44](#), *supra*, for the guardianship process.

2. Under [Wis. Stat.](#) § 55.14(1)(b), one of the following must be true:
 - a. Person incapable of expressing understanding of advantages and disadvantages of treatment, and alternatives to accepting particular treatment offered; or
 - b. Person is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to his or her condition to make an informed choice as to whether to accept or refuse psychotropic medication.
3. Advantages, disadvantages, and alternatives must have been explained to person.
4. Incapability must be because of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacity.
5. Person must have guardian to consent to or refuse psychotropic medication. [Wis. Stat.](#) § 55.14(8).
6. Person must have court-ordered treatment plan specifying protective services, including psychotropic medication that person should receive.
7. Court must review proposed plan and may approve or disapprove; if court approves, it must order appropriate county department to implement plan. [Wis. Stat.](#) § 55.14(8)(a).
8. Court orders appropriate county department to ensure that plan is implemented. [Wis. Stat.](#) § 55.14(8).

NOTE: If a person substantially fails to comply with the treatment plan ordered, the court may authorize the person's guardian to consent to forcible administration of psychotropic medication. [Wis. Stat.](#) § 55.14(2).

NOTE: Practice involving involuntary administration of psychotropic medications to individuals with Alzheimer's disease and related dementia disorders is evolving based on *Fond du Lac County v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis.

2d 500.

B. Procedure and Notice of Hearing [§ 19.833]

1. Guardian may consent to involuntary administration of psychotropic medication only in accordance with [Wis. Stat.](#) § 55.14; in general, procedures follow format of petitioning for protective services, with special requirements. [Wis. Stat.](#) §§ 55.14(2), (3), 55.075, 55.08.
2. Special requirements
 - a. Under [Wis. Stat.](#) §§ 55.14(3) and 55.06, in addition to requirements of a petition for protective services, petition for involuntary administration of psychotropic medication must allege all the following:
 - (1) A physician prescribed the psychotropic medication.
 - (2) The individual is not competent to refuse the psychotropic medication.
 - (3) Specific reasons why
 - (a) The individual refused to take the psychotropic medication voluntarily, or
 - (b) Attempting to administer psychotropic medication to the individual voluntarily is not feasible or is not in individual's best interests.
 - (4) Person likely to improve and respond to medication.
 - (5) As a result of failure to take medication, person is unable to provide for his or her care in community.
 - (6) Person will incur substantial risk of harm to self or others.
 - (7) Person is 18 years old or older.
 - b. Court must appoint legal counsel in all cases; ward is entitled to reasonable expenses incurred in contesting appointment; expenses to be paid out of guardianship estate. [Wis. Stat.](#) §§ 55.14(7), 55.105.
 - c. Petition must be heard within 30 days. [Wis. Stat.](#) § 55.14(7).

NOTE: Petition must also include evidence of unsuccessful, documented attempts to administer the medication voluntarily through appropriate alternatives.

3. Standard of proof is clear and convincing evidence that allegations in petition are true and proposed ward is not competent to refuse psychotropic medication. [Wis. Stat.](#) § 55.14(8).
4. Determination of competency to refuse medication

NOTE: In at least one instance, the court lost jurisdiction because the 30-day limit expired before the hearing was held.

3. Standard of proof is clear and convincing evidence that allegations in petition are true and proposed ward is not competent to refuse psychotropic medication. [Wis. Stat.](#) § 55.14(8).
4. Determination of competency to refuse medication

If court finds person not competent to refuse medication, court must do all the following:

- a. Appoint guardian to either consent to or refuse use of psychotropic medication as provided by court order.
- b. Order nursing home, hospital, appropriate county department, or contracted agency under [Wis. Stat.](#) § 55.02(2) to develop or furnish treatment plan specifying protective services that proposed ward should receive, including psychotropic medication as ordered by treating physician; treatment plan is subject to approval by guardian and to review and approval by court. [Wis. Stat.](#) §§ 55.14(8)(a), 55.02(2), 51.42(6).
- c. County of residence may enter into agreement with another county to provide protective placement under order of the court. [Wis. Stat.](#) § 55.19(1m).

NOTE: The county of residence is liable for services, but the county in which the person needing services is found may be liable in an emergency situation. [Wis. Stat.](#) § 51.437.

- d. Review plan and approve, disapprove, or modify plan. [Wis. Stat.](#) §§ 55.14(8)(a), 55.19(3)(e)2.
 - e. Order protective services under [Wis. Stat.](#) ch. 55.
 - f. Order appropriate county department to ensure that protective services are provided under [Wis. Stat.](#) ch. 55 in accordance with approved plan.
 - g. Hold annual review of order. [Wis. Stat.](#) §§ 55.14(13), 55.19; *see infra* § 19.49.
5. County may issue order authorizing sheriff or other law enforcement agency in county in which individual is found to take him or her into custody and transport him or her to an appropriate facility for forcible administration of psychotropic medication, with consent of guardian, only if court has made finding under [Wis. Stat.](#) § 55.14 that individual has substantially failed to comply with administration of psychotropic medication under individual's treatment plan. [Wis. Stat.](#) § 55.14(9).
 6. Person committed under [Wis. Stat.](#) § 55.14(9) is subject to circuit court order finding the person not competent to refuse psychotropic medication and authorizing administration of medication. Such person is considered a *patient* under [Wis. Stat.](#) § 51.61(1). If court follows proper procedure in making determination that patient is not competent to refuse psychotropic medication, patient is subject to treatment against patient's express wishes. Periodic judicial review of order is required for protection of patient's rights. *State v. Anthony D.B.*, 2000 WI 94, 237 Wis. 2d 1; *see also Milwaukee Cnty. v. Louise M. (In re Commitment of Louise M.)*, 205 Wis. 2d 162 (1996).

C. Evaluation of Need for Psychotropic Medication [§ 19.834]

See [Wis. Stat.](#) §§ 55.14, 55.19.

1. Written statement signed by physician who has personal knowledge regarding need and suitability of psychotropic medication for the individual. [Wis. Stat.](#) § 55.14(4).

NOTE: This statement is separate from the examining physician's report used with petitions for guardianship on the ground of incompetency. A statewide standard form is not available at this time. Each county has different requirements for this statement.

2. GAL reviews petition and reports to court whether allegations are true and whether psychotropic medication is in the individual's best interest. [Wis. Stat.](#) § 55.14(5).
3. Individual has right to independent medical or psychological examination, paid out of individual's estate or by county, if individual is indigent. [Wis. Stat.](#) § 55.14(6).

D. Annual Review of Order Authorizing Involuntary Administration of Psychotropic Medication [§ 19.835]

See [Wis. Stat.](#) §§ 55.14, 55.19.

1. County department review and written report
 - a. Visit ward.
 - b. Inform guardian of review and invite ward and guardian to submit comments or information regarding ward's needs before completing report of review.
 - c. Provide review to court, ward, and guardian.
2. GAL appointment and report
 - a. Visit ward and inform ward and guardian orally and in writing of procedure for review of involuntary-administration-of-psychotropic-medication order, ward's right to independent counsel, possibility of court ordering examination, contents of county department's report, possibility of court ordering a termination or modification of the order or modification of the treatment plan for involuntary administration of psychotropic medication, and right to full due-process hearing.
 - b. Review county department's report under [Wis. Stat.](#) § 55.19(1)(a)1.
 - c. Review ward's condition and rights with ward's guardian.
 - d. Ascertain whether ward wants to exercise rights under [Wis. Stat.](#) § 55.19(3)(b), (c), or (d).
 - e. Within 30 days after appointment, report in writing to court concerning whether ward appears to continue to meet standards for [Wis. Stat.](#) § 55.14 order.
3. On review of county department's evaluation and GAL's report, court may do either or both of the following:
 - a. Order independent evaluation (required if requested by ward, guardian, or GAL; county department's report not timely filed or fails to meet requirements; or deemed necessary by court after reviewing GAL report).

- b. Order summary hearing or full due-process hearing (full hearing required if requested by ward, guardian, or GAL; GAL report indicates ward no longer meets standard for involuntary administration of psychotropic medication; or GAL report indicates ward objects to the order).
4. After hearing, court will do one of the following:
 - a. Order continuation of order without modification.
 - b. Order continuation of order with modification.
 - c. Terminate order.
5. Guardianship may be terminated pursuant to [Wis. Stat.](#) § 54.64.

VIII. GUARDIANSHIP OF OTHER PERSONS [§ 19.836]

A. Spendthrift Persons [§ 19.837]

1. [Wis. Stat.](#) § 54.01(31) defines *spendthrift person* as the following:
 - a. Individual who, because of use of alcohol or drugs, gambling, or other wasteful course of conduct, is unable to manage effectively his or her financial affairs or is likely to affect health, life, or property of self or others; and
 - b. Support of individual or dependents would be endangered or ward would need public support.
2. Spendthrift individual can have guardian of estate or limited guardian of estate. Court prefers limited guardianship.

NOTE: As a practical matter, spendthrift trusts are not common; they are hard to prove. Courts encourage conservatorships instead, *see infra* §§ [19.79–.83](#). Practice varies from county to county.

3. Under [Wis. Stat.](#) § 54.38(2), notice of guardianship hearing must be
 - a. Served personally on proposed ward, and
 - b. Served at least 10 working days before hearing.
4. Guardianship terminated when court adjudicates ward capable of handling property. [Wis. Stat.](#) § 54.64(4)(a).

B. Persons with Degenerative Brain Disorders [§ 19.838]

1. Degenerative brain disorder is loss or dysfunction of an individual's brain cells. [Wis. Stat.](#) §§ 54.01(6), 55.01(1v).
2. Damage substantially impairs individual's ability to provide for own custody or care.

3. In practice, proposed wards with diagnoses such as major neurocognitive disorder (i.e., dementia) and Alzheimer's disease fall within this category.

C. Incapacitated Persons (Persons Suffering from "Other Like Incapacities") [§ 19.839]

See [Wis. Stat.](#) § 54.01(14), (15).

1. Defined under [Wis. Stat.](#) § 54.01(22) as condition incurred at any age that is result of
 - a. Accident,
 - b. Organic brain damage,
 - c. Mental or physical disability, or
 - d. Continued consumption or absorption of substances.
2. Condition substantially impairs individual's ability to provide for own custody or care.

D. Developmentally Disabled Persons [§ 19.840]

See [Wis. Stat.](#) § 54.01(8).

1. Disability attributable to
 - a. Intellectual disability,
 - b. Cerebral palsy,
 - c. Epilepsy,
 - d. Autism, or
 - e. Neurological condition closely related to intellectual disability or requiring treatment similar to that for individuals with intellectual disability.
2. Disability has continued or can be expected to continue indefinitely.
3. Disability substantially impairs individual from adequately providing for own custody or care and constitutes a substantial hardship to the individual.
4. Developmental disability does *not* include dementia primarily caused by a degenerative brain disorder. [Wis. Stat.](#) § 54.01(8).
5. County board of supervisors has primary responsibility for the well-being, treatment, and care of mentally ill, developmentally disabled, and alcohol-dependent people residing in that county; board must make sure these residents receive emergency treatment *if needed*. County of residence determines county liability, except when individual is found incompetent in an emergency. Primary responsibility is limited to the programs, services, and resources that the

county board of supervisors is reasonably able to provide within the limits of state and federal funds and of county funds required to be appropriated to match state funds. [Wis. Stat.](#) §§ 51.42(1)(b), 51.437(1), (4)(c).

IX. TEMPORARY GUARDIANSHIP [§ 19.841]

A. In General [§ 19.842]

See [Wis. Stat.](#) § 54.50.

1. Available for minor or for spendthrift or incompetent person.
2. Court must determine that the particular proposed ward's situation requires the immediate appointment of guardian of person, guardian of estate, or both.

NOTE: An example of a situation that required the immediate appointment of a temporary guardian is to establish a temporary decision-maker with the legal authority to either approve or deny a third party's request for medical records regarding an individual, when a health-care facility is questioning the individual's competency and the motives of individual's health-care agent's decisions, including an attempt to discharge the individual against medical advice. *Szymczak v. Terrace at St. Francis*, 2006 WI App 3, 289 Wis. 2d 110.

NOTE: Petition may be filed for temporary guardianship when petitioner disagrees with hospice decision, but petitioner must be able to prove proposed ward would not have consented to hospice admission. [Wis. Stat.](#) § 50.94(6).

3. Order of appointment limits time, not to exceed 60 days, but may be extended once for additional 60 days.

NOTE: There may be no further temporary guardianship on ward for at least 90 days after expiration of temporary guardianship and any extension.

4. Court must appoint GAL, who must try to meet with ward before hearing but must meet with ward within seven days after hearing. [Wis. Stat.](#) § 54.50(3)(b).

B. Appointment [§ 19.843]

1. [Wis. Stat.](#) § 54.50 provides that proposed ward must receive notice of the following:
 - a. Petition for appointment given under [Wis. Stat.](#) § 54.50.
 - b. Appointment of temporary guardian.
2. [Wis. Stat.](#) § 54.38(6) provides for notice of petition.
 - a. Service
 - (1) Before or at time petition is filed; or
 - (2) As soon thereafter as possible, no later than three calendar days after the hearing.

- b. Notice of petition must inform proposed ward of
 - (1) Right to counsel;
 - (2) Right to petition for reconsideration or modification under [Wis. Stat.](#) § 54.50(3)(d) at any time; and
 - (3) That ward, counsel, GAL, or any interested party may request a rehearing within 10 days after request. [Wis. Stat.](#) § 54.50(3)(d).
3. Bond provided as required by court.
4. Temporary guardianship ceases upon appointment of permanent guardianship, expiration of time period, or termination by court. [Wis. Stat.](#) § 54.50(4).

C. Specific Duties and Authority [§ 19.844]

See [Wis. Stat.](#) § 54.50(2).

1. Power and duties of temporary guardian are limited to those set forth in the order, and all provisions of statute apply except as limited by the order.
 - a. May include medical decisions.
 - b. When the parent of a child in legal custody cannot be found, court may appoint a temporary guardian. 71 Wis. Op. Att’y Gen. 28 (1982).
2. Unless court first specifically approves and orders bond, temporary guardian may not sell real estate or expend an amount in excess of \$2,000. [Wis. Stat.](#) § 54.50(2).
3. Temporary guardian must make reports as directed by court.
4. Upon termination, temporary guardian must account to court. [Wis. Stat.](#) § 54.50(4).
5. Upon termination, temporary guardian must deliver ward’s estate to person entitled. [Wis. Stat.](#) § 54.50(4).

X. TERMINATION OF GUARDIANSHIP [§ 19.845]

A. In General [§ 19.846]

See [Wis. Stat.](#) § 54.64.

1. Any guardianship of an individual found to be incompetent under [Wis. Stat.](#) ch. 54 continues during the lifetime of the ward, until terminated with court approval. See [Wis. Stat.](#) § 54.64.
2. Petition to terminate guardianship

- a. Persons who can file are adult ward, guardian, or individual acting on the ward's behalf.
- b. Can be filed
 - (1) 180 days after any previous hearing on a petition for guardianship, pursuant to [Wis. Stat.](#) § 54.64(2).
 - (2) Any time court determines that exigent circumstances, including presentation of new evidence, require a review.
3. Procedure following petition
 - a. Appoint a guardian ad litem.
 - b. Fix a time and place for hearing.
 - c. Designate persons who are entitled to notice of the hearing and designate manner in which the notice must be given.
 - d. Conduct hearing at which ward is present and has the right to a jury trial, if demanded.
4. After a hearing under para. (a) or on court's own motion, court may terminate or modify the guardianship, including restoring certain of the ward's rights.
5. Court must review and may terminate guardianship of person after marriage of incompetent person to any person not subject to guardianship. [Wis. Stat.](#) § 54.64(2)(d).

B. Termination of Guardianship of the Person [§ 19.847]

See [Wis. Stat.](#) § 54.64(3)(a).

1. Guardianship of person will be discharged on occurrence of any of the following:
 - a. Court adjudicates person to again be competent.
 - b. Ward changes residence from Wisconsin to another state and guardian is appointed in new state of residence.
 - c. A formerly minor ward attains age 18, unless the guardianship was ordered on the grounds of incompetency.
 - d. Minor ward marries.
 - e. Ward dies.

C. Termination of Guardianship of Estate [§ 19.848]

See [Wis. Stat.](#) § 54.64(4), (5).

1. Guardianship of estate may be discharged when any of following occurs:

- a. Minor attains majority.
 - b. Ward changes residence from Wisconsin to another state and a guardian is appointed in new state of residence.
 - c. Minor legally marries and court approves termination.
 - d. Court adjudicates former incompetent or spendthrift person to be capable of handling his or her property.
 - e. Ward's estate has been spent down such that it is advantageous to dispense with a guardianship of estate. [Wis. Stat.](#) § 54.64(5).
 - f. Ward dies (unless estate can be settled summarily under [Wis. Stat.](#) § 54.66(4)).
2. When ward's estate is less than \$50,000, court may determine whether it is to ward's advantage to dispense with guardianship of estate. [Wis. Stat.](#) §§ 54.64(5), 54.12.
- a. Court may order disposition of the remaining assets as provided by [Wis. Stat.](#) § 54.12.

NOTE: The guardian is to make appropriate financial arrangements for the burial or other disposition of the ward's remains.
 - b. Court may continue guardianship but waive bond requirements for guardian and waive or require an accounting by guardian.
 - c. Under [Wis. Stat.](#) § 54.12(1), court disposes of remaining assets of small estate by one of the following:
 - (1) Deposit in interest-bearing, insured account.
 - (2) Payment to ward's parent or person having actual custody.
 - (3) Payment to minor.
 - (4) Payment to agent under ward's durable power of attorney.
 - (5) Payment to trustee of any trust created for ward's benefit.
3. Upon termination of guardianship by death of guardian, guardian's personal representative must render guardian's final account and obtain discharge of guardian. [Wis. Stat.](#) § 54.66.
4. Termination must be finalized with court's approval of the guardian's final account and with an appropriate order discharging the guardian. *Id.*
5. On termination, guardian or guardian's personal representative renders final account to court and to one of the following:
- a. Ward or former ward,

- b. Successor guardian, or
 - c. Deceased ward's personal representative or special administrator.
6. Guardian files receipts with court.
 7. Court approves final account.
 8. Court discharges guardian and releases bond.

D. Termination of Temporary Guardianship [§ 19.849]

Under [Wis. Stat.](#) § 54.50(2) and (4), temporary guardianship terminates on occurrence of any of the following:

1. Expiration of time of appointment,
2. Appointment of permanent guardian, or
3. Court determination that cause of temporary guardianship terminated.

XI. MODIFICATION OF GUARDIANSHIP OR REMOVAL OF GUARDIAN [§ 19.850]

A. Generally [§ 19.851]

1. General guidelines for removal of guardian are in [Wis. Stat.](#) § 54.68.
2. Court removed guardian and awarded guardianship to the person who had custody of the ward's sibling, and held, after balancing competing interests, that overriding consideration is ward's best interest. Court determined any potential harm posed to child by removal was more than balanced by benefit of uniting siblings who had lost parents in accident. [Wis. Stat.](#) § 54.68(4)(d); *Michael H. v. Jeffrey G.N. (In re Guardianship of Cade E.R.)*, Nos. 03-0859, 03-0860, 2004 WL 95216 (Wis. Ct. App. Jan. 21, 2004) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).
3. Court may remove a paid guardian if a volunteer is available to replace guardian. [Wis. Stat.](#) § 54.68(5).
4. Cause of action exists against guardian of person or guardian of estate for any of the following:
 - a. Failing to timely file an inventory or account, as required under [Wis. Stat.](#) ch. 54, that is accurate and complete.
 - b. Committing fraud, waste, or mismanagement.
 - c. Abusing or neglecting the ward or knowingly permitting others to do so.
 - d. Knowingly isolating ward from ward's family members or violating a court order under [Wis. Stat.](#) § 50.085(2).

- e. Engaging in self-dealing.
- f. Failing to provide adequately for ward's personal needs from the ward's available assets and income, including any available public benefits.
- g. Failing to exercise due diligence and reasonable care in ensuring that ward's personal needs are being met in the least restrictive environment consistent with ward's needs and incapacities.
- h. Failing to act in ward's best interests.
- i. Failing to disclose conviction for a crime that would have prevented appointment of the person as guardian.
- j. Failing to disclose that guardian is listed under [Wis. Stat.](#) § 146.40(4g)(a)2.
- k. Other than as provided in paras. a.-j., *supra*, failing to perform any duties of a guardian or performing acts prohibited to a guardian as specified in [Wis. Stat.](#) §§ 54.18, 54.19, 54.20, 54.22, 54.25, and 54.62.

B. Guardianship of Person [§ 19.852]

- 1. Guardianship continues throughout lifetime of incompetent person or until terminated by court. [Wis. Stat.](#) § 54.64(1).
- 2. Under [Wis. Stat.](#) § 54.64(2), petition to have specific rights restored may be filed by
 - a. Guardian;
 - b. Ward, if adult; or
 - c. Any person acting on the ward's behalf.
- 3. Petition must specify
 - a. Particular rights, and
 - b. Reasons for modification or removal.
- 4. Petition may request that guardianship of person be terminated and that guardianship only of estate be established.

C. Guardianship of Incompetent Adult [§ 19.853]

- 1. On petition, court will review incompetency of adult ward. [Wis. Stat.](#) § 54.64.
- 2. Petition for review may be filed by
 - a. Adult ward,

- b. Interested person on adult ward's behalf, or
 - c. Adult ward's guardian.
3. Court will conduct hearing.
 - a. Ward must be present.
 - b. Court must appoint a GAL.
 - c. Ward has right to
 - (1) Jury trial, if requested; and
 - (2) Counsel, at county expense if ward is indigent.
4. After hearing, court may terminate or modify guardianship. [Wis. Stat.](#) § 54.64(2)(c).
5. Court may also review guardianship on its own motion.

NOTE: Situations in which modification is appropriate include when the person is under protective placement and other similar situations.
6. Court will require review of status of person under protective placement at least once every 12 months. [Wis. Stat.](#) § 55.18.
 - a. County department performs review and submits report; report will be filed with court and served on ward, guardian, and individual's agent under activated power of attorney for health care.
 - b. Court must annually appoint a GAL to meet with ward.
 - c. GAL must file written report.
 - d. GAL must inform ward as to legal rights.
 - e. Court may order independent evaluation.
 - f. Court must order legal counsel for ward under certain circumstances.
 - g. Court must hold either summary hearing or hearing under [Wis. Stat.](#) § 55.10(4).
 - (1) A summary hearing must be held on the record; may be held in court or by other means, including by telephone or videoconference; is not an evidentiary hearing; and does not require attendance by the individual.
 - (2) A hearing under the requirements of [Wis. Stat.](#) § 55.10(4) must be held if any of the following apply:

- (a) Ward, guardian, or GAL so requests.
 - (b) GAL's report indicates that ward no longer meets standards for protective placement under [Wis. Stat.](#) § 55.08(1).
 - (c) GAL's report indicates that current protective placement is not in least restrictive environment consistent with ward's needs.
 - (d) GAL's report indicates that the individual objects to the current protective placement.
- h. After hearing, court *may* order
- (1) Continuation,
 - (2) Modification, or
 - (3) Termination.

D. Guardianship of Estate [§ 19.854]

See [Wis. Stat.](#) § 54.68.

1. For causes of action against guardian of estate, see section [19.65](#), *supra*.
2. Upon filing of petition to review guardian's conduct, court to do the following:
 - a. Hold hearing in 10–60 days.
 - b. Order petitioner to provide notice of hearing to ward, guardian, and any other persons determined by court.
 - c. May authorize any discovery methods under [Wis. Stat.](#) ch. 804.
3. Available remedies include the following:
 - a. Order guardian to file inventory or other report or account required of the guardian.
 - b. Require guardian to reimburse ward or, if ward is deceased, ward's estate for losses incurred as result of guardian's breach of duty to the ward.

NOTE: When there is waste and mismanagement, court will use legal rate of interest to determine amount of income lost to guardianship by failure of guardian to manage investments. *Western Sur. Co. v. P.A.H. (In re Guardianship & Est. of P.A.H.)*, 115 Wis. 2d 670 (Ct. App. 1983).

- c. Impose a forfeiture of up to \$10,000 on guardian, deny compensation for guardian, or both.
- d. Remove guardian.

- e. Enter any other order that may be necessary or appropriate to compel guardian to act in ward's best interests or to otherwise carry out guardian's duties.
4. Court may remove paid guardian if previously unavailable volunteer guardian is now available and it is in ward's best interests.
5. Court may require guardian to pay personally any costs of proceeding.
6. Ward may retain legal counsel, selection of whom is subject to court approval, regardless of guardian consent or finding of cause.
7. Successor guardian's fees are normally not chargeable to former guardian unless court so orders. *Western Sur. Co.*, 115 Wis. 2d 670.

E. Discharge of Guardian [§ 19.855]

See [Wis. Stat.](#) § 54.66(1), (3).

1. On termination, guardian or guardian's personal representative renders final account to court and to one of the following:
 - a. Ward or former ward,
 - b. Successor guardian, or
 - c. Deceased ward's personal representative or special administrator.
2. Guardian files receipts with court.
3. Court approves final account.
4. Court discharges guardian and releases bond.

F. Appointment of Successor Guardian [§ 19.856]

1. On removal of guardian by court order or when guardian dies or resigns, court on its own motion or on petition of any interested party may appoint successor guardian even if appeal is pending. [Wis. Stat.](#) §§ 54.54, 808.075(4)(f)4.
2. Court may on its own motion or on request of interested party hold hearing in same manner and subject to same requirements as for original appointment.
3. If appointment is without hearing, successor guardian must provide notice to ward and all interested parties of appointment, right to counsel, and right to petition for reconsideration (notice must be served personally or by mail not less than 10 days after appointment). [Wis. Stat.](#) § 54.54(2).
4. Standby guardian

- a. Court can appoint during guardianship hearing or on petition at any time. [Wis. Stat. § 54.52\(1\)](#).
- b. Succeeds as guardian on death, unwillingness or inability to act, resignation, or court's removal, or when initially appointed guardian is temporarily unable to fulfill his or her duties, including extended vacation or illness of minor's or incompetent person's initially appointed guardian of person, guardian of estate, or both, if qualified to court's satisfaction at time of succession. [Wis. Stat. § 54.52\(2\)](#).

NOTE: [Wis. Stat. § 48.978](#) governs the appointment of standby guardians for minors.

- c. Has same powers and duties as initially appointed guardian. [Wis. Stat. § 54.52\(2\)](#).

NOTE: Because procedures on standby guardianship vary from county to county, it is wise to check with the county in which the standby guardian is to be appointed.

XII. PROTECTIVE PLACEMENT [§ 19.857]

NOTE: This discussion of protective placement is limited; appropriate statutes, statutory history, and relevant federal and state case law should be carefully reviewed. A petition for protective placement or services, even if made at time of petition for guardianship, must be made in a separate document. *See* [Wis. Stat. § 55.075\(3\)](#).

A. Jurisdiction [§ 19.858]

See Grant Cnty. Dep't of Soc. Servs. v. Unified Bd. (In re Guardianship of Jane E.P.), 2004 WI App 153, 275 Wis. 2d 680, *vacated and remanded*, 2005 WI 106, 283 Wis. 2d 258.

1. A court cannot deny a petition for guardianship of a person found within the county even though the person is not yet a resident of that county. To deny a resident of another state who is moving to the county the right to use the courts of that county is a violation of his or her constitutional right to travel.
2. Time limits for protective placement are different than for guardianship, in which petitions are brought at the same time. Care must be taken to abide by differing time limits. *Compare* [Wis. Stat. § 54.44\(1\)](#), *with* [Wis. Stat. § 55.10](#).

B. Eligible Wards and Providers [§ 19.859]

1. [Wis. Stat. § 55.06](#) contains eligibility requirements for wards.
 - a. Wards age 18 or older who are incompetent; ward alleged to be developmentally disabled may be eligible at age 14.

NOTE: If incompetency under [Wis. Stat. ch. 54](#) is determined more than one year before the filing of protective placement application, the court must review the finding on competency. [Wis. Stat. § 55.075\(3\)](#).

- b. Wards age 14 or older if alleged to be developmentally disabled.

- c. Procedure for adult protective placement may be commenced six months before birthday upon which ward becomes eligible. [Wis. Stat.](#) § 55.06.
 - d. If child before court is alleged to be in need of protection or services and voluntary or involuntary admission or placement is to be made, court must proceed under [Wis. Stat.](#) ch. 51 or 55; children's court issues are beyond scope of this chapter. [Wis. Stat.](#) § 48.135(2).
 - e. Persons eligible for guardianship must be protectively placed if in nursing home of more than 16 beds whether guardian consents to continued placement after person has voluntarily entered nursing home or placement is made at time of entry. *Cavey v. Milwaukee Cnty. (In re Guardianship of Agnes T.)*, 189 Wis. 2d 520 (1995).
 - f. Principal's admission to facility by health-care agent under terms of power-of-attorney-for-health-care instrument and in accordance with [Wis. Stat.](#) ch. 155 or admission to nursing home or CBRF is not protective placement. [Wis. Stat.](#) § 55.055(4).
2. [Wis. Stat.](#) § 55.12(3), (4), and (8) deal with requirements for providers.
- a. Protective placement must be in least restrictive environment considering all the following:
 - (1) Need for health, social, or rehabilitative services;
 - (2) Level of supervision needed;
 - (3) Reasonableness of placement, considering costs and benefits;

NOTE: Court may also order protective services as an alternative to placement.

 - (4) Limits of state and federal funding available; and
 - (5) Reasonableness of protective placement or protective services given the number or projected number of individuals who will need protective placement or protective services and given the limited funds available.

Except under [Wis. Stat.](#) § 49.45(30m), county cannot be forced to provide funds beyond those required to match state funds but must show good faith and reasonable effort to find and fund an appropriate placement in accordance with statutory factors. [Wis. Stat.](#) § 55.12(5); *see also Dunn Cnty. v. Judy K. (In re Guardianship of Judy K.)*, 2002 WI 87, 254 Wis. 2d 383; *Dunn Cnty. v. Peggy R. (In re Guardianship & Protective Placement of Peggy R.)*, No. 04-0438, 2004 WL 1534785 (Wis. Ct. App. July 7, 2004) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

- b. Under [Wis. Stat.](#) § 55.12(2), placements may be made to
 - (1) Nursing homes,
 - (2) Public medical institutions,

- (3) Centers for developmentally disabled persons,
 - (4) Foster-care services,
 - (5) Home placements, or
 - (6) Other appropriate facilities.
- c. Placement *may* be outside county, but placement is not binding unless county receives notice of request to be placed in that county. 76 Wis. Op. Att’y Gen. 103 (1987) (OAG 25-87).
 - d. County *not* required to create new facility; development of plan to meet person’s needs is important, however. *Fond du Lac Cnty. v. J.G.S. (In re J.G.S.)*, 159 Wis. 2d 685 (Ct. App. 1990).
 - e. Counties must make an affirmative showing of a good-faith effort to find an appropriate placement and to secure funds to pay for an appropriate placement. This is the “find and fund standard.” See, however, *Peggy R.*, 2004 WL 1534785, in which court set forth five factors governing decision regarding “least restrictive placement”; court found county made reasonable effort to find and fund placement requested but could not reasonably provide it because of fund shortage.

NOTE: The court determined a good-faith effort was made by county when a county department put candidate for protective placement on waiting lists for several programs that would have been appropriate. See also *Matthew M. v. Walworth Cnty. Dep’t of Health & Hum. Servs. (In re Guardianship of Matthew M.)*, No. 02-2684, 2003 WL 1249651 (Wis. Ct. App. Mar. 19, 2003) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

- f. In response to objections to placement transfer, court may review transfer decision in a hearing, take testimony, hear evidence, and determine what constitutes least restrictive environment consistent with ward’s needs. [Wis. Stat. § 55.15](#); *Dunn Cnty. Dep’t of Hum. Servs. v. LaMoine S. (In re Guardianship & Protective Placement of LaMoine S.)*, No. 96-1773, 1997 WL 88006 (Wis. Ct. App. Mar. 4, 1997) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).
- g. Placements cannot be made to any of following:
 - (1) Units for acutely mentally ill individuals. [Wis. Stat. § 55.12\(2\)](#).
 - (2) Locked units, without specific finding of court as to need for such action under [Wis. Stat. § 51.20\(2\)](#) or 51.15. [Wis. Stat. § 55.12\(2\)](#).

NOTE: Petition for involuntary treatment under [Wis. Stat. § 51.20\(1\)](#) must allege that the individual is mentally ill or, except as provided under [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#), drug dependent or developmentally disabled and meets requirements for dangerousness under one of five standards. A person with a dual diagnosis may qualify under the fifth standard. *Dane Cnty. v. Kelly M. (In re Commitment of Kelly M.)*, 2011 WI App 69, 333 Wis. 2d 719.

- (3) Corporate guardian appointed under [Wis. Stat.](#) ch. 54 cannot also be the provider of protective services or placement for its ward. [Wis. Stat.](#) § 55.03(1).
- h. Admission to facility of principal by health-care agent under power of attorney for health care is *not* protective placement under [Wis. Stat.](#) ch. 55. [Wis. Stat.](#) § 55.055(4); *see also* [Wis. Stat.](#) ch. 155.
- i. Admission to nursing home or CBRF under requirements of [Wis. Stat.](#) § 50.06 is *not* protective placement under [Wis. Stat.](#) ch. 55.
- j. Court must order general review of any individual subject to a protective placement order under [Wis. Stat.](#) § 55.12 or 55.06. [Wis. Stat.](#) § 55.18.
 - (1) County must review status of individual, including visiting and making a written evaluation, and filing report and recommendations to court. [Wis. Stat.](#) § 55.18(1).
 - (2) Report must be provided to individual, guardian, relevant county department, and individual's health-care agent if agent has activated health-care powers. [Wis. Stat.](#) § 55.18(1)(a)3.
 - (3) If individual is subject to an order for involuntary administration of psychotropic medication, review must be conducted along with annual review of medication under [Wis. Stat.](#) § 55.19. [Wis. Stat.](#) §§ 55.18(1)(bm), 55.19.
 - (4) When court receives report, GAL must be appointed to review the report, meet with individual and guardian, and explain rights and procedure to individual. [Wis. Stat.](#) § 55.18(2).
 - (5) GAL must file report with court within 30 days after appointment and make recommendation. [Wis. Stat.](#) § 55.18(2)(f).
 - (6) Court must review report and, if appropriate, hold hearing under [Wis. Stat.](#) § 55.10 and make order. Hearing may be summary or full hearing as determined by court. [Wis. Stat.](#) § 55.18(3).
 - (7) Court must appoint adversary counsel, if one is needed. [Wis. Stat.](#) § 55.18(3)(c).

C. Emergency Protective Placement [§ 19.860]

See [Wis. Stat.](#) § 55.135.

- 1. Grounds
 - a. Must appear probable that if not immediately placed, person will present substantial risk of harm to self or others. [Wis. Stat.](#) § 55.135(1).
 - b. Probability of substantial risk of harm to self or others if person is not placed must be
 - (1) Based on personal observation of, or a reliable report made by an identified person to, one of the following:

- (a) Sheriff,
- (b) Police officer,
- (c) Firefighter,
- (d) Guardian, or
- (e) Authorized representative of county department or agency with which department contracts under [Wis. Stat. § 55.02\(2\)](#); and

NOTE: Observation usually is required to be *very recent* (i.e., within 60-day period).

- (2) Result of
 - (a) Developmental disability,
 - (b) Degenerative brain disorder,
 - (c) Serious and persistent mental illness, or
 - (d) Other like incapacity.

2. Procedure

- a. Person is taken into custody and transported to appropriate medical or protective placement facility by person making observation. [Wis. Stat. § 55.135](#).
- b. Statement
 - (1) Under [Wis. Stat. § 55.135\(1\)](#), at time of detention, person making placement must prepare a statement containing
 - (a) Specific factual information concerning person's observations, and
 - (b) Basis for emergency placement.
 - (2) Person who *knowingly* signs false statement may be convicted of Class H felony; penalty is fine of up to \$10,000, imprisonment of up to six years, or both; no liability if person acts in good faith. [Wis. Stat. §§ 55.135\(2\), \(3\), 939.50\(3\)\(h\)](#).
 - (3) Under [Wis. Stat. §§ 55.135 and 55.075](#), statement must be filed
 - (a) With director of facility, and
 - (b) With any petition under [Wis. Stat. § 55.075](#).
- c. [Wis. Stat. §§ 55.075 and 55.135\(4\)](#) pertain to notice of rights.

- (1) At time of placement, facility's director or director's designee must inform detainee orally and in writing of rights to
 - (a) Contact attorney and family member, and
 - (b) Have attorney provided at public expense if detainee indigent.
 - (2) Detainee must receive copy of statement by person making placement.
- d. [Wis. Stat.](#) § 55.075 pertains to petitions.
- (1) On detention, petition for protective placement is filed by person making emergency placement.
 - (2) If detainee is not under guardianship, petition for guardianship must accompany placement petition, except in case of minor alleged to be developmentally disabled.
- e. Notice of hearing on probable cause ([Wis. Stat.](#) §§ 55.135(4), 55.075) must be
- (1) Written and oral, and
 - (2) Served on detainee by person making placement.
- f. Hearing. [Wis. Stat.](#) § 55.135(4).
- (1) Held within 72 hours, excluding Saturdays, Sundays, and legal holidays; failure to hold hearing within 72 hours after time when person is first taken into custody causes court to lose competence to determine probable cause and a new petition will not reset the clock. *Kindcare, Inc. v. Judith G. (In re Protective Placement, with Guardianship, of Judith G.)*, 2002 WI App 36, 250 Wis. 2d 817.
 - (2) Purpose is to establish probable cause to believe grounds for protective placement under [Wis. Stat.](#) § 55.08(1).
- g. Determination
- (1) No probable cause to believe allegations.
 - (2) Person is more appropriate for civil commitment (proceed as for petition for commitment under [Wis. Stat.](#) § 51.20 or 51.45(13)). [Wis. Stat.](#) § 55.135(4).
- NOTE: [Wis. Stat.](#) § 51.45 sets forth, in detail, the procedure for the involuntary commitment of alcoholics.
- (3) Probable cause to believe allegations of petition. [Wis. Stat.](#) § 55.135(5).
 - (a) Order temporary placement for 30 days pending hearing for permanent placement, or
 - (b) Order protective services as required.

- (4) Final hearing for permanent protective placement must be held within 30 days after probable cause hearing and within stated jurisdictional time. *N.N. v. Dane Cnty. (In re Guardianship & Protective Placement of N.N.)*, 140 Wis. 2d 64 (Ct. App. 1987).
- (5) Temporary placement may be extended not more than 90 days if necessary for the county department to develop a permanent plan. [Wis. Stat.](#) § 55.135(5); *State ex rel. Sandra D. v. Getto*, 175 Wis. 2d 490 (Ct. App. 1993).
- h. A law enforcement agency, fire department, or any agency accustomed to taking persons into custody under [Wis. Stat.](#) § 55.135 must designate at least one employee to attend in-service training on emergency detention and emergency protective placement. [Wis. Stat.](#) § 55.135(6).
- i. Appeal may be taken of any final order or judgment to court of appeals, within time prescribed by [Wis. Stat.](#) § 808.04(3) and in accordance with [Wis. Stat.](#) § 809.30, by subject, guardian, or any petitioner or representative of public. [Wis. Stat.](#) §§ 51.20(15), 55.20.

D. Initial Placement [§ 19.861]

1. Under [Wis. Stat.](#) § 55.075, petition is filed in county of residence, by any of the following:
 - a. DHS,
 - b. County agency (for example, Aging and Disability Resource Center (ADRC) or Department on Aging),
 - c. Guardian, or
 - d. Any interested person.

Neither district attorney nor corporation counsel has a duty to petition under [Wis. Stat.](#) ch. 55 when an apparently competent elderly person with life-threatening disease chooses to refuse care. 74 Wis. Op. Att’y Gen. 188 (1985), https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/1985/Volume%2074_1985.pdf.

2. Contents of petition
 - a. [Wis. Stat.](#) § 55.08(1) provides that allegations that person meets standard for protective placement must include all the following:
 - (1) Person has primary need for residential care and custody.
 - (2) Except for minor alleged to be developmentally disabled, person has been determined to be incompetent or is a minor for whom petition for guardianship has been submitted.
 - (3) Person is totally incapable of providing for own care or custody

- (a) As result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacity; and
 - (b) So as to create substantial risk of serious harm to self or others, either by overt acts or acts of omission.
- (4) Person has disability that is permanent or likely to be permanent.

NOTE: Permanence or likelihood of permanence can be established by finding that the ward's condition is not treatable by known methods. *K.N.K. v. Buhler (In re Guardianship of K.N.K.)*, 139 Wis. 2d 190 (Ct. App. 1987).

- b. Particular factual basis for allegations. [Wis. Stat.](#) § 55.075(2)(a).
 - c. Must be based on petitioner's personal knowledge. [Wis. Stat.](#) § 55.075(2)(b).
3. Notice of petition. [Wis. Stat.](#) § 55.09.
- a. Contains names of all petitioners. [Wis. Stat.](#) § 55.09(1).
 - b. Under [Wis. Stat.](#) § 55.09(1), (2), the following must be served:
 - (1) Person to be placed,
 - (2) GAL,
 - (3) Legal counsel,
 - (4) Guardian,
 - (5) Agent under an activated power of attorney for health care,
 - (6) Presumptive adult heirs,
 - (7) Persons who have physical custody of person to be protected,
 - (8) County department,
 - (9) Any provider of aid to person,
 - (10) Others as court may require (including Department of Veterans Affairs if appropriate), and
 - (11) DHS (or the county department dealing with developmentally disabled persons, if placement is sought and the county department participates in program under [Wis. Stat.](#) § 46.278 for persons with developmental disabilities).
 - c. Method of service

- (1) On person to be placed. [Wis. Stat.](#) § 55.09(1).
 - (a) By personal service at least 10 days before hearing.
 - (b) Person must be informed of complete contents of notice.
 - (2) Proof of service of notice must be filed with court. *See* Affidavit of Service, Form GN-3120; Certificate of Service on Individual, Form GN-3121.
 - (3) On other persons or agencies. [Wis. Stat.](#) § 55.09(2).
 - (a) By personal service or by mail.
 - (b) If placement sought in center for developmentally disabled persons, serve DHS by personal service or by mail at least 10 days before hearing. [Wis. Stat.](#) § 55.09(2)(h).
4. Venue. [Wis. Stat.](#) § 55.075(5)(bm).
- Court in which petition is first filed will determine venue.
5. Evaluation. [Wis. Stat.](#) § 55.11.
- a. Court directs comprehensive evaluation of person to be placed if not previously made, and court may request statement or testimony of DHS regarding placement in a center for developmentally disabled persons regarding appropriateness of placement for the individual and purpose of placement in center. [Wis. Stat.](#) § 55.11(1).
 - b. [Wis. Stat.](#) § 55.11(1) provides that comprehensive evaluation must include the following:
 - (1) Address of person and current provider of services, if any.
 - (2) Résumé of professional treatment and services provided by DHS or agency in connection with problem creating need for placement; see also [Wis. Stat.](#) § 55.01(1g) for definition of “agency.”
 - (3) Medical, psychological, social, vocational, and educational evaluation and review.
 - (4) Recommendations for or against partial legal rights under [Wis. Stat.](#) § 54.25(2).
 - (5) Recommendations for placement consistent with least restrictive environment required per [Wis. Stat.](#) § 55.12(3), (4), (5).
 - c. [Wis. Stat.](#) § 55.11(3) provides that at least 96 hours before hearing, copy of evaluation must be provided to the following:
 - (1) Guardian,
 - (2) Agent under any activated power of attorney,

- (3) GAL, and
- (4) Person to be placed or attorney.

NOTE: Check with the county involved to determine whether the petitioner's attorney is charged with arranging the evaluation, filing the evaluation with the court, arranging service of the report once filed, etc. Procedures regarding the comprehensive evaluation vary by county.

- d. Under [Wis. Stat.](#) § 55.11(5), if placement is sought in a center for developmentally disabled persons, court will request from DHS statement regarding whether
 - (1) Placement is appropriate for person's needs, and
 - (2) Placement is consistent with center's purpose.

NOTE: The statement is not required if DHS provided testimony under [Wis. Stat.](#) § 55.11(5), *see infra* para. 8.d.

- e. Person to be placed has right to independent medical or psychological evaluation, at county expense if person is indigent. [Wis. Stat.](#) §§ 55.11(2), 54.42(3).

NOTE: The report for protective placement purposes is separate from the examining physician's report used in petitions for guardianship on the ground of incompetency. A statewide standard form is not available at this time. Each county has different requirements for this written report.

6. Time requirements. [Wis. Stat.](#) § 55.10(1).
 - a. Petition for protective placement of person must be heard within 60 days after filing unless an extension of time is requested. The court can extend the deadline by up to 45 days.
 - b. If person placed objects to health-care decision as not in his or her best interests or verbally objects to or otherwise protests admission, hearing must be held as soon as possible within 60-day period.
7. Right to counsel. [Wis. Stat.](#) §§ 55.10(4)(a), (b), 54.46(3)(b).
 - a. Court will appoint attorney to serve as GAL for person to be placed.
 - b. In addition, person has right to court-appointed counsel. [Wis. Stat.](#) § 55.10(4)(a).
 - (1) On person's request, at least 72 hours before hearing;
 - (2) If GAL or other person states person's opposition to placement; or
 - (3) If court determines justice so requires.

- c. If proposed ward is indigent, he or she has right to counsel at county expense and court will appoint counsel under [Wis. Stat.](#) § 977.08. [Wis. Stat.](#) §§ 55.10(4)(a), 55.105.
- d. Proposed ward has right to jury trial if jury trial demanded by proposed ward, GAL, or attorney, but application must be made at least 48 hours before time set for hearing to avoid waiving right to jury trial. [Wis. Stat.](#) §§ 55.10(4)(c), 54.42(2).

8. Hearing

- a. [Wis. Stat.](#) § 55.10(4) applies to all hearings except transfers of placement and summary hearings. [Wis. Stat.](#) § 55.10.
- b. Attendance
 - (1) Person is presumed able to attend hearing unless GAL certifies to court that person is unable to attend. [Wis. Stat.](#) § 55.10(2).

NOTE: If the individual is unable to attend a hearing only because of residency in a nursing home or other facility, physical inaccessibility, or lack of transportation, the court must, if requested by the individual, the individual's GAL, the individual's counsel, or other interested person, hold the hearing in a place where the individual is able to attend.

GAL must make written certification to court. Oral certification is not acceptable. *Dane Cnty. Dep't of Health Servs. v. Michael L. (In re Guardianship of Michael L.)*, No. 2007AP1641, 2008 WL 1969374 (Wis. Ct. App. May 8, 2008) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); see also *Jefferson Cnty. v. Joseph S. (In re Guardianship with Protective Placement of Joseph S.)*, 2010 WI App 160, 330 Wis. 2d 737; Report of Guardian Ad Litem Guardianship Due to Incompetency (Adult Guardianship), Wisconsin circuit court form GN-3160; Report and Recommendation of Guardian Ad Litem (Annual Review), Wisconsin circuit court form GN-4110.

- (2) GAL must be present at all hearings if person to be placed does not have legal counsel; court may excuse appearance if GAL makes report in writing. [Wis. Stat.](#) § 55.10(4)(b).
- c. Due process
 - (1) Trial by jury. [Wis. Stat.](#) §§ 55.10(4)(c), 756.06(2)(b).
 - (a) Jury of 6 persons unless party requests greater number, not to exceed 12.
 - (b) Court can order, on its own motion, number of jurors not to exceed 12.
 - (2) Person to be placed has right to present and cross-examine witnesses. [Wis. Stat.](#) § 55.10(4)(c).
 - (3) Person to be placed has right to appeal court's final decision. [Wis. Stat.](#) § 55.20.
- d. DHS may submit oral or written testimony regarding placement in center for developmentally disabled persons. [Wis. Stat.](#) § 55.11(5).

- e. Burden of proof is clear and convincing evidence that individual to be placed is in need of placement. [Wis. Stat.](#) § 55.10(4)(d).
- f. Dangerousness element required for protective placement is not subject to speculation but must be directly foreseeable based on proposed ward's overt acts or omissions. *K.N.K.*, 139 Wis. 2d 190.
- g. If requested by court, corporation counsel will assist in conducting proceedings. [Wis. Stat.](#) § 55.02(3).

9. Determination

- a. Before protective placement may be ordered, court must find that person meets standard for protective placement, *see supra* para. 2.a. [Wis. Stat.](#) §§ 55.10(4)(d), 55.08(1).

NOTE: The statute forbids protective placement of an individual who would be more properly treated under [Wis. Stat.](#) § 51.20 or 51.45(13) (involuntary commitment of alcoholics). *K.N.K.*, 139 Wis. 2d 190.

NOTE: Each case stands or falls on its own facts as to what is least restrictive; the county must develop plan that meets the individual's needs. *Fond du Lac Cnty. v. J.G.S. (In re J.G.S.)*, 159 Wis. 2d 685 (Ct. App. 1990).

- b. Court may order protective services as alternative to protective placement. [Wis. Stat.](#) § 55.12(1).
- c. Court *may* order protective services for incompetent person or minor alleged to be developmentally disabled and on whose behalf a guardianship petition has been submitted, who will otherwise incur substantial risk of physical harm or deterioration or will present substantial risk of physical harm to others. [Wis. Stat.](#) § 55.08(2).
- d. Appeal may be taken to court of appeals, under provisions of [Wis. Stat.](#) § 55.20 or [Wis. Stat.](#) § 51.20(15), as appropriate, within time limits set forth in [Wis. Stat.](#) § 808.04(3) and in accordance with [Wis. Stat.](#) § 809.30. [Wis. Stat.](#) §§ 51.20(15), 55.20.

NOTE: The appellate court will uphold a circuit court's discretionary finding of need for protective placement for a reason not advanced by the circuit court that could support its rationale. In this case, the appellate court concluded that in spite of admission of hearsay evidence that should have been excluded, the overall record supported the determination that the ward was incompetent, the condition was permanent, and protective placement was required. *Racine Cnty. v. Mary Jane S. (In re Protective Placement of Mary Jane S.)*, No. 03-0723-FT, 2003 WL 21397720 (Wis. Ct. App. June 18, 2003) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

E. Specific Duties and Authority of Guardian ad Litem [§ 19.862]

See [Wis. Stat.](#) §§ 54.42(1), (2), 54.40(4).

- 1. Under [Wis. Stat.](#) § 55.10(4)(b), conduct personal interview with person to be placed, providing both of following:

- a. Explanation of proceedings, and
 - b. Information regarding right to counsel.
2. Notify person to be placed, both orally and in writing, of rights to all the following:
- a. Jury trial if requested by
 - (1) Person to be placed,
 - (2) Attorney, or
 - (3) GAL.
 - b. Appeal.
 - c. Counsel.
 - d. Independent evaluation, at county expense if person is indigent.
3. Present and cross-examine witnesses at hearing unless court excuses personal appearance by GAL.

F. Review of Placement [§ 19.863]

1. County department reviews status every 12 months unless court orders more frequent review. [Wis. Stat.](#) § 55.18(1)(a).
 - a. Review includes
 - (1) Written evaluation of person's physical, mental, and social condition.
 - (2) Recommendations for discharge or less restrictive placement.
 - (3) Evaluation must include detailed information, set forth in [Wis. Stat.](#) § 55.18(1)(a)1.a.-g. [Wis. Stat.](#) § 55.14.
 - b. Under [Wis. Stat.](#) § 55.18(1)(a)3., report of review must be provided to
 - (1) Person subject to placement,
 - (2) Court,
 - (3) Guardian, and

NOTE: Guardian must be notified and may submit comments.
 - (4) Individual's agent under an activated power of attorney for health care.

2. *Watts* review—annual court review of placement. *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65 (1985).

NOTE: [Wis. Stat.](#) § 55.18(2) codifies these requirements. Read it carefully.

- a. Court appoints GAL to review placement and report to court.
- b. GAL must do all the following:
 - (1) Visit person and inform person of right to due-process hearing on need for continued placement or on appropriateness of present placement facility and of rights to independent examination and independent counsel.
 - (2) Inform guardian of person's right to due-process hearing, independent examination, and independent counsel.
 - (3) Review [Wis. Stat.](#) § 55.18 annual report of county department and [Wis. Stat.](#) § 54.25 report by guardian of the person.
 - (4) Request additional evaluation if necessary.
 - (5) Report to court concerning the following:
 - (a) Whether person continues to meet standards for protective placement.
 - (b) Whether current placement is least restrictive environment consistent with person's needs.
 - (c) Whether person or guardian requests a change in status, placement, or services, including psychotropic medication.
 - (d) Whether counsel should be appointed.
 - (e) Whether guardian has died, is not acting for any reason, or is inappropriate (e.g., does not visit ward, does not advocate for ward, becomes incompetent or moves away, has conflict of interest).
 - (f) Whether due-process hearing should be held.
- c. On review of GAL's report, court decides the following:
 - (1) Whether to order additional information.
 - (2) Whether to appoint defense counsel.
 - (3) Whether to hold due-process hearing under [Wis. Stat.](#) § 55.10 or summary hearing; to continue protective placement, the court must hold either a full due-process hearing or a summary hearing and must make factual findings of the need for continuation of the protective placement under [Wis. Stat.](#) ch. 55. Under *Dunn County*

v. Goldie H. (In re Guardianship & Protective Placement of Goldie H.), 2001 WI 102, 245 Wis. 2d 538, due-process hearing should be required under any of the following circumstances:

- (a) Person, guardian, or GAL requests one.
- (b) GAL's report indicates person no longer meets standards for protective placement.
- (c) Current placement is not least restrictive environment.
- (d) Person objects to present placement.
- (e) Guardian is not appropriate or has died.

G. Termination or Modification of Protective Placement [§ 19.864]

1. File petition for termination or modification under [Wis. Stat.](#) § 55.17(1).
 - a. Any of the following may file:
 - (1) Guardian,
 - (2) Ward,
 - (3) GAL,
 - (4) DHS,
 - (5) County department or agency, or
 - (6) Any interested person.
 - b. Petition for termination should allege that conditions that warranted placement are no longer present.
 - c. Petition must be heard if initial or previous hearing not held within previous six months. [Wis. Stat.](#) § 55.16(3).

NOTE: If a hearing was held within the previous six months, the petition will be heard at the court's discretion.
 - d. Petition heard within 21 days after receipt by court. [Wis. Stat.](#) § 55.16(3).
2. Rights, limitations, and procedures for enforcement of rights and penalties prescribed in [Wis. Stat.](#) § 51.61 apply to persons receiving services under [Wis. Stat.](#) ch. 55 voluntarily or involuntarily. [Wis. Stat.](#) § 55.23(1).
3. A parent denied physical placement under [Wis. Stat.](#) § 767.41(4)(b) or 767.451(4) may not have parent's rights of access to records under [Wis. Stat.](#) ch. 55. [Wis. Stat.](#) § 55.23(2).

XIII. CONSERVATORSHIP [§ 19.865]**A. In General [§ 19.866]**

1. Conservatorship is voluntary proceeding for person unable to properly manage property or income. [Wis. Stat.](#) § 54.76(1).
2. Appointment of conservator is not evidence of applicant's competency or incompetency. [Wis. Stat.](#) § 54.76(5).

B. Appointment of Conservator [§ 19.867]

1. Adult resident may apply to circuit court of county of residence. [Wis. Stat.](#) § 54.76(1).
2. Hearing. [Wis. Stat.](#) § 54.76(1).
 - a. Court sets hearing and directs to whom and how notice to be given, including to presumptive heirs, and how notice can be waived.
 - b. Under [Wis. Stat.](#) § 54.76(2), applicant will be personally examined at hearing to satisfy court that
 - (1) Applicant desires conservator, and
 - (2) Fiduciary nominated is suitable.
 - c. Court appoints conservator and fixes bond and can also appoint a standby conservator. [Wis. Stat.](#) § 54.76(2), (3n).

C. Specific Duties and Authority of Conservator [§ 19.868]

1. In general, conservator has all duties and power of guardian of estate of incompetent person. Duties include filing and updating inventory. Court fee is based on total value of estate. [Wis. Stat.](#) § 54.76(3); *see Angela S. v. Jefferson Cnty. (In re Guardianship of Bradley C.S.)*, 2006 WI App 260, 297 Wis. 2d 42.
2. Person subject to conservatorship may make gift of income or assets with approval of either court or conservator; however, court approval is not required under [Wis. Stat.](#) § 54.76(3). *James v. Wicke (In re Conservatorship of Wicke)*, No. 2014AP78, 2014 WL 4976764 (Wis. Ct. App. Oct. 7, 2014) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)). A gift made by a person subject to conservatorship can be invalidated if the estate is under conservatorship and approval is not obtained. *Zobel v. Fenendael*, 127 Wis. 2d 382 (Ct. App. 1985).
3. As in guardianship, court order required for sale of real estate by conservator. *See* [Wis. Stat.](#) § 54.20(3)(g).
4. Inventory and annual accounting required; filing fees paid at time of filing of inventory. [Wis. Stat.](#) § 54.76(1).

D. Termination of Conservatorship [§ 19.869]

See [Wis. Stat.](#) § 54.76(4).

1. Any person, including one whose estate is subject to conservatorship, may apply for termination.
2. Ten days' notice by mail must be provided to all the following:
 - a. Guardian of person, if any
 - b. Conservator
 - c. Any standby conservator
 - d. Presumptive adult heirs
 - e. Agent under power of attorney for health care
3. Court will hold hearing on notice and unless clearly shown that applicant is incompetent, court will remove conservator and
 - a. Return property to applicant, or
 - b. Appoint successor conservator if applicant so desires and nominee is suitable.
4. Standards for removal of conservator are discussed in [Wis. Stat.](#) § 54.76(6) and standards for termination of a conservator's powers are discussed in [Wis. Stat.](#) § 54.76(7). [Wis. Stat.](#) § 54.76(6), (7).

XIV. POWERS OF ATTORNEY [§ 19.870]**A. Durable Power of Attorney for Finances and Property [§ 19.871]**

See [Wis. Stat.](#) ch. 244; see also Carl Rasmussen et al., *Miscellaneous Estate Planning Issues*, in Patrick V. Anderl et al., *Eckhardt's Workbook for Wisconsin Estate Planners* ch. 11 (State Bar of Wis. 7th ed. 2019 & Supp.).

1. In general
 - a. Principal designates another person as his or her agent.
 - b. Power of agent is exercisable notwithstanding principal's later disability or incapacity. [Wis. Stat.](#) §§ 244.04(3), 244.04.
2. Establishment of durable power of attorney for finances and property

- a. To execute power of attorney, principal must sign power-of-attorney document. Principal's signature is presumed to be valid if acknowledged before a notary public. [Wis. Stat.](#) § 244.05.
- b. Uniform statutory financial power provides form and checklist to be used by principal in granting power; statute also explains powers that may be granted. [Wis. Stat.](#) § 244.61; *see also* Wis. DHS, Wisconsin Statutory Power of Attorney for Finances and Property (rev. Aug. 2016), <https://www.dhs.wisconsin.gov/forms/advdirectives/f00036.pdf>.
- c. Power of attorney created under [Wis. Stat.](#) ch. 244 is durable unless document expressly provides that it is terminated by principal's incapacity. [Wis. Stat.](#) § 244.04.
- d. Writing should specify who determines disability or incapacity. [Wis. Stat.](#) § 244.09(2), (3).
- e. If principal has not specified who will make determination, may be physician, psychologist, attorney, judge, or appropriate governmental official. [Wis. Stat.](#) § 244.09(3).
- f. Power of attorney is not terminated by court's later appointment of guardian or conservator of principal's estate, but court can limit, suspend, or terminate agent's authority. [Wis. Stat.](#) § 244.08(2).
- g. Under [Wis. Stat.](#) § 244.16, any of the following may petition court for review of the agent's performance:
 - (1) Principal or agent;
 - (2) Guardian, conservator, or other fiduciary acting for principal;
 - (3) Person authorized to make health-care decisions for principal;
 - (4) Principal's spouse, parent, descendent, or domestic partner under [Wis. Stat.](#) ch. 770;
 - (5) Individual who would qualify as principal's presumptive heir;
 - (6) Prospective beneficiary;
 - (7) Certain governmental agencies;
 - (8) Principal's caregiver or another person who demonstrates sufficient interest in principal's welfare; or
 - (9) Person asked to accept power of attorney.
- h. Wisconsin courts have emphasized importance of selecting competent and trustworthy agent, to avoid conflicts of interest and abuse of power, and that appointment be made by competent principal. *See In re Disciplinary Proc. Against Elverman*, 2014 WI 15, 353 Wis. 2d 98; *Laatsch v. Derzon (In re Est. of Derzon)*, No. 2012AP2590, 2014 WL 7093570 (Wis. Ct. App. Dec. 16, 2014) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)); *Salem Evangelical Lutheran Church v. Kangas*, No.

2013AP2064, 2014 WL 3582748 (Wis. Ct. App. July 22, 2014) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

3. Specific duties and authority of agent

a. Authority

- (1) As stated in power-of-attorney document.

NOTE: Any limits on the agent's power should be clearly set forth. See [Wis. Stat.](#) § 244.41.

- (2) May include nomination of conservator or guardian. [Wis. Stat.](#) § 244.08(1).

- b. Statutory instrument contains expansive powers, including powers over principal's finances, that may be granted to agent by principal's initialing line describing separate powers; principal may also give special instructions on powers granted to agent by writing them into document. [Wis. Stat.](#) §§ 244.52, 244.61; see also Wis. DHS, Wisconsin Statutory Power of Attorney for Finances and Property (rev. Aug. 2016), <https://www.dhs.wisconsin.gov/forms/advdirectives/f00036.pdf>.

NOTE: Counsel must advise the principal very carefully on the possible consequences of granting powers as described in statutory form. The statutory form is particularly dangerous for persons using it without legal counsel because it gives broad control to a third party, and, if the principal does not fully understand the legal consequences of the power, its use may be very costly to the principal in unanticipated ways.

- c. Duty to principal. [Wis. Stat.](#) § 244.14; *Methodist Manor Health Ctr., Inc. v. Py*, 2008 WI App 31, 307 Wis. 2d 501 (determining, in suit against granddaughter with power of attorney for grandmother, that there was no fraudulent transfer of funds because granddaughter received no assets of principal; cash funds were given to principal by agent at principal's request and agent (granddaughter) received no benefit); *Praefke v. American Enter. Life Ins. Co.*, 2002 WI App 235, 257 Wis. 2d 637. *But see Russ v. Russ*, 2007 WI 83, 302 Wis. 2d 264 (distinguishing case in which mother put son on joint account before naming him as her agent under durable power of attorney for financial purposes).

Under cases decided before creation of [Wis. Stat.](#) ch. 244, courts held that an agent has a fiduciary duty to a principal and must act solely for the benefit of the principal in all matters connected with the agency, even at expense of agent's own interests; powers are strictly construed when fiduciary argues that power of attorney allows for self-dealing, and the power must be specifically authorized in the instrument; if principal desires to permit gifting provision, powers must be carefully drawn and strictly construed; and general gifting authority is not adequate. See [Wis. Stat.](#) § 244.41(1)(b); see *Estate of Roppe v. Roppe*, No. 2018AP1116, 2019 WL 2932845 (Wis. Ct. App. July 9, 2019) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

- d. Accountability. [Wis. Stat.](#) § 244.14.

- (1) Persons to whom agent is accountable include the following:

- (a) Principal; and

- (b) Other fiduciary, if any.
 - (2) Agent must keep record of all receipts, disbursements, and transactions made on principal's behalf.
 - (3) Construction of power or review of agent's conduct
 - (a) Any statutorily designated person may petition circuit court in county where principal is present or in county of principal's residence to construe power of attorney or review agent's conduct and to grant appropriate relief. [Wis. Stat. § 244.16](#).
 - (b) Petition by interested party charging agent with unlawful conduct will not succeed in situation in which competent principal ratified acts of the agent. [Wis. Stat. § 244.16\(2\)](#); *Lippert v. Lippert*, No. 2010AP1053, 2011 WL 1775997 (Wis. Ct. App. May 11, 2011) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).
4. Termination of durable power of attorney
- a. Under [Wis. Stat. § 244.10](#), power of attorney terminates on occurrence of any of the following:
 - (1) Death of principal;
 - (2) Principal becoming incapacitated, if power of attorney so provides;
 - (3) Revocation by principal;
 - (4) Power of attorney provides for termination;
 - (5) Purpose of power of attorney is accomplished; or
 - (6) Principal revokes agent's authority or agent dies, becomes incapacitated, or resigns, and power of attorney does not provide for another agent to have authority.
 - b. Disability does not revoke a *nondurable* power without notice to person relying on it in good faith. [Wis. Stat. § 244.10\(5\)](#).
 - c. Passage of time does not revoke durable power unless document *provides* time of revocation. See [Wis. Stat. § 244.10\(1\)\(d\)](#), (3).
 - d. Agent who accepts revocation of power by principal has no standing to act in proceedings regarding competency of principal. *Winiarski v. Village at Manor Park (In re Guardianship of Florence T.O.)*, 2008 WI App 7, 307 Wis. 2d 203.
 - e. Execution of a power of attorney does not revoke a power of attorney previously executed by principal unless later power of attorney provides that previous power of attorney is revoked or that all other powers of attorney are revoked. [Wis. Stat. § 244.10\(6\)](#).

5. Termination of agent's authority under [Wis. Stat.](#) § 244.10.
 - a. Agent's authority terminates on occurrence of any of the following:
 - (1) Principal revokes authority;
 - (2) Agent dies, becomes incapacitated, or resigns;
 - (3) Action is filed for dissolution or annulment of agent's marriage to principal or to legal separation of agent and principal, unless power of attorney provides otherwise;
 - (4) Power of attorney terminates; or
 - (5) Domestic partnership of agent and principal terminates, unless power of attorney provides otherwise.
 - b. Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person who, without actual knowledge of the termination, acts in good faith under the power of attorney; an act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

B. Power of Attorney for Health Care [§ 19.872]

See [Wis. Stat.](#) ch. 155.

1. Interplay of durable power of attorney for finances and property and power of attorney for health care. [Wis. Stat.](#) § 244.64.
 - a. Agent under [Wis. Stat.](#) ch. 244 generally does not have power to make health-care decisions for principal. [Wis. Stat.](#) § 244.64.
 - b. Although [Wis. Stat.](#) ch. 155 does not preclude continued use of durable power of attorney to authorize an agent to make decisions regarding principal's health care, none of the enumerated authorities in [Wis. Stat.](#) ch. 244 provide for such powers, except [Wis. Stat.](#) § 244.53(1)(f), which confers only limited authority.
2. General durable power of attorney with health-care powers executed before April 28, 1990, including any provision for health care, remains valid. [Wis. Stat.](#) § 155.70(4)(a).
3. A valid power of attorney for health care executed in another state or jurisdiction, in compliance with law of that state or jurisdiction, is valid and enforceable in Wisconsin to the extent that the document authorizes agent to make health-care decisions that a health-care agent may make under [Wis. Stat.](#) ch. 155. [Wis. Stat.](#) § 155.70(10).
4. Main provisions
 - a. Adult of sound mind may designate agent for health-care decisions; for purposes of [Wis. Stat.](#) § 155.05(1), person for whom adjudication of incompetence and guardianship is in

effect is not presumed to be of sound mind for purposes of executing a health-care power of attorney. [Wis. Stat.](#) § 155.05(1).

- b. Principal may designate an alternate. [Wis. Stat.](#) § 155.05(5).
- c. Under [Wis. Stat.](#) § 155.05(3), health-care agent may not be
 - (1) Health-care provider,
 - (2) Employee of health-care provider, or
 - (3) Spouse of health-care provider or employee.

NOTE: A relative of the principal may be one of these.
- d. [Wis. Stat.](#) § 155.10(1)(a), (b) provides that power of attorney for health care must be
 - (1) Voluntarily executed,
 - (2) In writing, and
 - (3) Dated and signed by principal or by adult under express direction and in presence of principal.
- e. Under [Wis. Stat.](#) § 155.10(1)(c), (2), power-of-attorney-for-health-care instrument must be signed in presence of two adult witnesses who are not any of the following:
 - (1) Related to principal by blood, marriage, or adoption.
 - (2) Entitled and know that they are entitled to claim portion of principal's estate.
 - (3) Directly responsible for principal's health care.
 - (4) Principal's health-care provider who is serving principal at same time. [Wis. Stat.](#) § 155.10(2)(d).
 - (5) Employees, other than chaplain or social worker, of health-care provider or of inpatient facility in which principal is patient.
 - (6) Principal's health-care agent. [Wis. Stat.](#) § 155.10(2)(e).
- f. Two physicians (or one physician and one advanced practice clinician) not related to principal or having claim on estate must determine incapacity, and copy of the statement must be appended to power-of-attorney-for-health-care instrument. [Wis. Stat.](#) § 155.05(2).
- g. Failure to execute power of attorney for health care creates no presumption regarding principal's intent regarding health-care decisions. [Wis. Stat.](#) § 155.70(8).

- h. Statute defines *incapacity* as “inability to receive and evaluate information effectively or to communicate decisions to such an extent that individual lacks the capacity to manage his or her health-care decisions.” [Wis. Stat.](#) § 155.01(8).

5. Agent’s powers and limitations

- a. Desires of competent principal supersede durable power; however, health-care agent known to health-care provider has priority over any individual other than principal to make health-care decisions. [Wis. Stat.](#) §§ 155.05(4), 155.20(1).
- b. Agent must act in best interest of principal.
- c. Agent must act in good faith consistent with provisions of any living will executed by principal. [Wis. Stat.](#) ch. 154; [Wis. Stat.](#) § 155.20(5).

NOTE: Care must be taken that if both instruments (i.e., living will and power of attorney for health care) are used, they are consistent. *If they are in conflict, the power of attorney for health care governs.*

- d. No deliberate act to end life may be condoned except withholding of health care for purpose of permitting natural process of dying. [Wis. Stat.](#) § 155.70(7).
- e. If a principal is adjudicated incompetent after executing a health-care power, the power remains in effect except that the court may, under [Wis. Stat.](#) § 54.46(2)(b), for good cause shown, revoke the power or limit the authority of the agent under the terms of the instrument. [Wis. Stat.](#) §§ 155.40(2m), 54.46(2)(b).
- f. [Wis. Stat.](#) § 155.20(2)(c)2. provides that if authorized in power of attorney for health care, agent may admit principal to nursing home for recuperative care if admitted directly from hospital inpatient unit unless hospitalization was for psychiatric care, or for other purposes if
 - (1) Specifically authorized by power of attorney for health care, and
 - (2) Principal is not diagnosed as developmentally disabled or mentally ill (statutory form permits principal to check yes or no to such admissions).
- g. If principal lives with agent, agent may admit principal to facility for up to 30 days for respite care. [Wis. Stat.](#) § 155.20(2)(c)2.b.
- h. Agent may not admit principal to mental-health facility on inpatient basis or intermediate-care facility for persons with an intellectual disability as defined under [Wis. Stat.](#) § 46.278(1m)(am) or state or other treatment facility as defined in [Wis. Stat.](#) § 51.01(15) and (19). [Wis. Stat.](#) § 155.20(2)(a).
- i. Agent may not consent to experimental mental-health research or psychosurgery, electroconvulsive treatment, or other drastic mental-health treatment. [Wis. Stat.](#) § 155.20(3).
- j. Agent may consent to withholding or withdrawing a feeding tube if the document so authorizes and principal’s attending health-care professional advises that such action will

not cause principal pain or reduce comfort (orally ingested hydration or nutrition may be withdrawn only if “medically contraindicated”). [Wis. Stat.](#) § 155.20(4).

- k. Health-care decisions for principal known to be pregnant must be specifically authorized by power of attorney for health care. [Wis. Stat.](#) § 155.20(6).
- l. Provisions of valid power of attorney for health care *supersede* any directly conflicting provisions in valid declaration to health-care professionals executed by principal under [Wis. Stat.](#) ch. 154. [Wis. Stat.](#) §§ 155.20(5), 155.70(3).
- m. A valid power of attorney for health care executed in another state or jurisdiction, in compliance with the law of that state or jurisdiction, is valid and enforceable in Wisconsin to the extent that the document authorizes agent to make health-care decisions that a health-care agent may make under [Wis. Stat.](#) ch. 155. [Wis. Stat.](#) § 155.70(10).
- n. A health-care agent may make an anatomical gift of all or a part of the principal’s body as provided under [Wis. Stat.](#) § 157.06(4)(b) or (9)(a)1. unless prohibited by the health-care instrument or some other record. Revocation of an anatomical gift may be made by the donor or the health-care agent before the donor’s death under [Wis. Stat.](#) § 157.04. [Wis. Stat.](#) § 155.20(8).

6. Execution

- a. [Wis. Stat.](#) § 155.10 provides that to be valid, power-of-attorney-for-health-care instrument must be all the following:
 - (1) Written.
 - (2) Dated and signed by principal 18 years of age or older in the presence of two witnesses who meet requirements (*see supra* para. 4.e.); may also be dated and signed by individual 18 years old or older at express direction and in presence of principal. Agent appointed in document cannot act as witness of his or her own appointment. *Winiarski v. Village at Manor Park (In re Guardianship of Florence T.O.)*, 2008 WI App 7, ¶ 4, 307 Wis. 2d 203.
 - (3) Voluntarily executed.
- b. Statutory form may be used; must contain notice. [Wis. Stat.](#) § 155.30(3); *see also* Wis. DHS, Power of Attorney for Health Care Document (rev. Feb. 2020), <https://www.dhs.wisconsin.gov/forms/advdirectives/f00085.pdf>.
- c. Other forms must contain statutory notice or certification of attorney (“I am a lawyer authorized to practice law in Wisconsin and have advised my client concerning his or her rights in connection with this power of attorney for health care and the applicable law.”). [Wis. Stat.](#) § 155.30(2).

NOTE: It is wise for the attorney who is drawing up the power-of-attorney-for-health-care instrument to make certain that the principal understands every provision.

7. Revocation

- a. [Wis. Stat.](#) § 155.40(1) provides that principal may do any of the following:
 - (1) Deface or destroy instrument.
 - (2) Execute written revocation.
 - (3) Execute subsequent power of attorney instrument.
 - (4) Orally express intent to revoke power before two witnesses.
 - b. Divorce or annulment revokes power of attorney for health care of former spouse; termination of domestic partnership revokes power of attorney for health care of former domestic partner. [Wis. Stat.](#) § 155.40(2).
 - c. Health-care agent must communicate revocation to providers, and providers must note revocation and date, time, and place of revocation. [Wis. Stat.](#) § 155.40(3), (4).
 - d. If a person is adjudicated incompetent after execution of a power of attorney for health care, the power continues in effect unless court, for good cause, revokes or limits it. [Wis. Stat.](#) § 155.60(2).
8. Nothing in [Wis. Stat.](#) ch. 155 prohibits a petition to court to determine competency of principal. [Wis. Stat.](#) § 155.60(1).
 9. No provider may be charged with crime, be civilly liable, or be charged with unprofessional conduct for any of following:
 - a. Certifying incapacity in good faith. [Wis. Stat.](#) § 155.50(1)(a).
 - b. Failing to comply with power of attorney for health care unless health-care professional refuses to make good-faith efforts to transfer principal to another physician who will comply. [Wis. Stat.](#) § 155.50(1)(b).
 - c. Complying with power of attorney for health care or agent's decision in absence of knowledge of revocation. [Wis. Stat.](#) § 155.50(1)(c).
 - d. Acting contrary to or failing to act on revocation *unless* with actual knowledge of revocation. [Wis. Stat.](#) §§ 155.50(1)(d), 155.80(4).
 - e. Failing to obtain agent's decision if reasonable attempt to contact agent has been made. [Wis. Stat.](#) § 155.50(1)(e).

NOTE: In absence of notice to the contrary, the provider may presume that the agent had authority. [Wis. Stat.](#) § 155.50(2).

10. Immunity of agent

- a. No health-care agent may be charged civilly or criminally for good-faith decision under instrument in compliance with [Wis. Stat.](#) ch. 155. [Wis. Stat.](#) § 155.50(3).

- b. No health-care agent who is not principal's spouse may be held liable for goods or services contracted for under power of attorney for health care.
11. The provisions above apply to acts or omissions in connection with a provision of power of attorney for health care executed in another jurisdiction if the provisions are valid and enforceable. [Wis. Stat.](#) § 155.50(4).
12. Safeguards
- a. Nothing in [Wis. Stat.](#) ch. 155 prevents petition for guardianship under [Wis. Stat.](#) ch. 54. [Wis. Stat.](#) § 155.60(1).
 - b. Upon appointment of guardian, power of attorney for health care remains in effect unless court determines it should be revoked or limited; guardian may not make health-care decisions for ward unless guardian is agent under power of attorney for health care. [Wis. Stat.](#) § 155.60(2).
 - c. Power-of-attorney-for-health-care instrument received by health-care provider or facility must be acknowledged in writing and placed in principal's medical record. [Wis. Stat.](#) § 155.60(3).
 - d. Interested party may petition probate court to review whether agent is properly performing duties under power of attorney for health care. [Wis. Stat.](#) § 155.60(4)(a).
 - e. If after hearing court determines agent not performing, court may, under [Wis. Stat.](#) § 155.60(4)(a), do any of the following:
 - (1) Direct agent to perform in accordance with power of attorney for health care.
 - (2) Require agent to regularly report on performance.
 - (3) Rescind power of attorney for health care and allow named alternate to take over. [Wis. Stat.](#) § 155.60(4)(a)3., (b).
13. General provisions
- a. Health-care decision under power of attorney for health care does not, for any purpose, constitute suicide, nor does execution of power-of-attorney-for-health-care instrument. [Wis. Stat.](#) § 155.70(1)(a).
 - b. Insurer not prohibited from making determination that principal has committed or attempted suicide based on action of principal apart from power of attorney for health care.
 - c. Power of attorney for health care may not be required as condition for receipt of health care or for admission to health-care facility. [Wis. Stat.](#) § 155.70(2).
 - d. [Wis. Stat.](#) ch. 155 does not apply to living will; however, if power of attorney for health care and living will are in direct conflict, power of attorney for health care will govern (drafters should be cautious regarding this issue). [Wis. Stat.](#) ch. 154; [Wis. Stat.](#) § 155.70(3).

NOTE: A power of attorney for health care and a living will can be combined in a single document, thus avoiding conflicts.

- e. Insurer may not refuse to pay for health care directed by agent under power of attorney for health care. [Wis. Stat.](#) § 155.70(5).
- f. Faxes and photocopies of a power-of-attorney-for-health-care instrument are presumed valid. [Wis. Stat.](#) § 155.70(6).

14. Privacy considerations

Because of changes in privacy laws, some attorneys are recommending to clients that they execute a document separate from power of attorney for health care giving agent immediate access to all medical records, even if power not otherwise activated.

15. Penalties

- a. Whoever coerces individual to execute power of attorney for health care may be fined not more than \$500, imprisoned for not more than 30 days, or both. [Wis. Stat.](#) § 155.80(1).
- b. Whoever intentionally conceals, cancels, defaces, obliterates, damages, or destroys power-of-attorney-for-health-care instrument without consent of principal may be fined not more than \$500, imprisoned for not more than 30 days, or both. [Wis. Stat.](#) § 155.80(2).
- c. Whoever knowingly conceals, falsifies, or forges instrument with intent to create false impression that person other than health-care agent has been so designated may be fined not more than \$1,000, imprisoned for not more than nine months, or both. [Wis. Stat.](#) § 155.80(3).
- d. Whoever knowingly withholds knowledge of power of attorney for health care or of falsification or forgery may be fined not more than \$1,000, imprisoned not more than nine months, or both. [Wis. Stat.](#) § 155.80(4).
- e. Whoever acts on power of attorney for health care known to be involuntarily executed, impermissibly forged, or substantially altered may be fined not more than \$1,000, imprisoned for not more than nine months, or both. [Wis. Stat.](#) § 155.80(5).

C. Power of Attorney for Parental Powers [§ 19.873]

- 1. General terms appear in [Wis. Stat.](#) § 48.979(1)(a).
 - a. Parent who has legal custody of a child may delegate to an agent, for up to one year, any of his or her powers regarding the child's care and custody, subject to the limitations of d. below.
 - b. Delegation of powers does not deprive parent of any of his or her powers regarding the child.

- c. If another parent also has legal custody of the child, that parent must join in exercising the power of attorney.
- d. Parent may delegate any power regarding child's care and custody *except* power to consent to any of the following:
 - (1) Child's marriage,
 - (2) Child's adoption,
 - (3) Performance or inducement of abortion on or for child,
 - (4) Termination of parental rights to child, and
 - (5) Enlistment of child in U.S. armed forces.
- e. Delegation of powers regarding care and custody of an Indian child is subject to requirements of [Wis. Stat. § 48.028\(5\)\(a\)](#). [Wis. Stat. § 48.979\(1\)\(dm\)](#).

2. Limitations

- a. Parents cannot delegate powers regarding child who is subject to court jurisdiction under [Wis. Stat. § 48.13](#), [48.14](#), [938.12](#), [938.13](#), or [938.14](#) unless the court approves the delegation. [Wis. Stat. § 48.979\(1\)\(bm\)](#).
- b. Parent who has legal custody of a child may not place child in a foster home, group home, or inpatient treatment facility by means of a delegation of powers. Such delegation can only be made by court order. [Wis. Stat. § 48.979\(1\)\(c\)](#).
- c. [Wis. Stat. § 48.979\(1\)\(d\)](#) provides that delegation of powers does not prevent or supersede any of the following:
 - (1) Agency, sheriff, or police department from receiving and investigating report of suspected or threatened abuse or neglect of child under [Wis. Stat. § 48.981](#).
 - (2) The child from being taken into or held in custody under [Wis. Stat. §§ 48.19–.21](#) or [Wis. Stat. §§ 938.19–.21](#).
 - (3) An intake worker from conducting an intake inquiry under [Wis. Stat. § 48.24](#) or [Wis. Stat. § 938.24](#).
 - (4) Court from exercising jurisdiction over child under [Wis. Stat. § 48.13](#) or [Wis. Stat. § 938.13](#).

3. Creation and revocation

- a. Power of attorney complies with statute if its language substantially conforms to language in example in statute. [Wis. Stat. § 48.979\(2\)](#).

- b. Parent who has delegated powers may revoke delegation *at any time* by executing written revocation and notifying agent in writing of revocation. This provision, though well intentioned, can present serious problems if parent chooses to exercise it without careful thought. [Wis. Stat.](#) § 48.979(1)(e).

XV. SUPPORTED DECISION-MAKING AGREEMENTS [§ 19.874]

NOTE: [Wis. Stat.](#) ch. 52 was created as chapter 53 by 2017 Wis. Act 345 and was renumbered to [Wis. Stat.](#) ch. 52 by the Legislative Reference Bureau. It became effective April 18, 2018. Because the Act and the chapter are relatively new, they have received little examination by attorneys, and it is unclear how attorneys will implement the statutes or the courts will interpret them.

A. In General [§ 19.875]

[Wis. Stat.](#) ch. 52 allows an adult with a functional impairment to voluntarily authorize another adult to assist the adult with a functional impairment in making life decisions, including decisions about where and with whom to live; the services, supports, and medical care the adult receives; and where the adult wants to work. This is to occur without impeding the self-determination of the functionally impaired adult. See [Wis. Stat.](#) § 52.10.

B. Key Definitions [§ 19.876]

1. *Supported decision-making* means a process of supporting and accommodating an adult with a functional impairment to enable the adult to make life decisions without impeding the adult's self-determination. [Wis. Stat.](#) § 52.01(6).
2. *Supporter* means an adult who is willing to enter into an agreement with an adult with a functional impairment to provide supported decision-making. [Wis. Stat.](#) § 52.01(8).
3. *Functional impairment* means a physical, developmental, or mental condition that substantially limits one or more major life activities, which include, but are not limited to, the capacity for independent living, self-direction, self-care, mobility, communication, learning; or a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities as those terms are defined in [Wis. Stat.](#) § 54.01. [Wis. Stat.](#) § 52.01(2).

C. Scope of the Agreement [§ 19.877]

1. An adult with a functional impairment may, voluntarily and without coercion, enter into an agreement authorizing a supporter to do any of the following:
 - a. Provide supported decision-making that includes the understanding of options, responsibilities, and consequences of life decisions without making the decision for the adult. [Wis. Stat.](#) § 52.10(1)(a).
 - b. Assist the adult in accessing, collecting, and obtaining information relevant to a life decision, including medical, psychological, financial, educational, or treatment records, from any person. [Wis. Stat.](#) § 52.10(1)(b). The supporter may not access information that is not relevant to the decision. [Wis. Stat.](#) § 52.16. A supporter must obtain a release from the functionally impaired adult to access patient health-care and educational records. [Wis. Stat.](#) § 52.16(2), (3). Regardless of the existence of an agreement, the functionally impaired adult continues to have unrestricted access to his or her own records.

- c. Assist the adult in understanding the information gathered. [Wis. Stat.](#) § 52.10(1)(c).
- d. Assist the adult to communicate the decision to appropriate persons. [Wis. Stat.](#) § 52.10(1)(d).

NOTE: The supporter is not a surrogate decision-maker; he or she does not have authority to sign legal documents or bind the adult to legal agreements. [Wis. Stat.](#) § 52.10(2).

D. Term of the Agreement [§ 19.878]

A supported decision-making agreement remains in effect until any of the following occurs:

1. The agreement terminates by its terms or is terminated by the parties. [Wis. Stat.](#) § 52.14(1).
 - a. The functionally impaired adult may revoke the agreement at any time as set forth in [Wis. Stat.](#) § 52.14(3).
 - b. The supporter may resign by giving notice to the functionally impaired adult or by a means set forth in the agreement. [Wis. Stat.](#) § 52.14(4).
2. County adult protective services substantiates neglect or abuse by the supporter. [Wis. Stat.](#) § 52.14(2)(a).
3. The supporter is found criminally liable for neglect or abuse. [Wis. Stat.](#) § 52.14(2)(b).
4. A restraining order is granted against the supporter. [Wis. Stat.](#) § 54.12(2)(c).

E. Requirements of the Agreement [§ 19.879]

1. [Wis. Stat.](#) § 52.18 covers authorization and witnessing of agreements.
2. The functionally impaired adult and supporter must sign and date the agreement
 - a. In the presence of two or more witnesses who are at least 18 years old, or
 - b. In the presence of a notary.

NOTE: An example of a supported decision-making agreement is at [Wis. Stat.](#) § 52.20; *see also* Wis. DHS, Supported Decision-Making Agreement (Aug. 2018), <https://www.dhs.wisconsin.gov/forms/f02377.pdf>.

F. Duty of Persons with Respect to the Agreement [§ 19.880]

1. A supporter acting in good faith under a valid agreement is immune from civil liability for acts and omissions when acting in conformance with the agreement and using ordinary prudence. [Wis. Stat.](#) § 52.30(8).
2. A person receiving an agreement must rely on the agreement unless the person has cause to believe abuse, neglect, undue influence, or exploitation is present. [Wis. Stat.](#) § 52.30(1).

3. Neither criminal or civil liability nor professional misconduct exists for an act or omission that is done in good faith and in reliance on an agreement. [Wis. Stat.](#) § 52.30(2).
4. Health-care providers acting consistent with authority provided by a supporter under a valid duly executed agreement receive immunity unless they have knowledge that the agreement is revoked or invalid or that the supporter committed abuse, neglect, or exploitation of the functionally impaired adult. [Wis. Stat.](#) § 52.30(3).
5. A health-care provider that provides care based on the consent of the functionally impaired adult and with supports under an agreement is immune from any action alleging a lack of capacity unless the health-care provider has actual knowledge that such authorization is revoked, the agreement is invalid, or the supporter has abused, neglected, or exploited the functionally impaired adult. [Wis. Stat.](#) § 52.30(4).
6. Any entity that discloses personal information about a functionally impaired adult to a supporter authorized to obtain the information is immune from any action alleging improper or unlawful disclosure unless the entity has actual knowledge the functionally impaired adult revoked the authorization. [Wis. Stat.](#) § 52.30(5).

G. Reporting of Suspected Abuse, Neglect, or Exploitation [§ 19.881]

A person receiving an agreement or aware of such an agreement may, but is not required to, report neglect or exploitation unless under a reporting requirement under another statute. [Wis. Stat.](#) § 52.32.

XVI. DECLARATION TO HEALTH-CARE PROFESSIONALS (LIVING WILL) [§ 19.882]

Any person of sound mind who is 18 years old or older may execute; effective date is date of execution; may authorize withholding or withdrawal of life-sustaining procedures and feeding tubes if person in persistent vegetative state. [Wis. Stat.](#) § 154.03(1).

A. Basic Rules [§ 19.883]

1. Under [Wis. Stat.](#) § 154.03(1), must be signed in presence of two witnesses who
 - a. Are not related to declarant by blood, marriage, or adoption;
 - b. Have no knowledge that they are entitled to claim any portion of declarant's estate;
 - c. Are not directly financially responsible for declarant's health care; and
 - d. Are not health-care providers under [Wis. Stat.](#) § 155.01(7) (other than a chaplain or social worker).
2. Forms must be made available by DHS to hospitals, health-care professionals, nursing homes, county clerks, local bar associations, and private persons. [Wis. Stat.](#) § 154.03(2); *see also* Wis. DHS, Declaration to Health Care Professionals (Wisconsin Living Will) (rev. Feb. 2020), <https://www.dhs.wisconsin.gov/forms/advdirectives/f00060.pdf>.

3. Instructions must be provided to persons before signing and must be understood by declarant.
4. May be filed with register in probate if desired, but *filing is not required and not customarily done*. [Wis. Stat.](#) § 154.13.
5. If declaration is inconsistent with power of attorney for health care, *power of attorney for health care will govern*. [Wis. Stat.](#) § 155.70(3).

B. Directives to Health-Care Professionals [§ 19.884]

See [Wis. Stat.](#) § 154.03.

1. For withholding or withdrawal of life-sustaining procedures or feeding tubes, two health-care professionals, at least one of whom is a physician, must have personally examined patient and certified in writing that patient has terminal condition or is in persistent vegetative state.
2. Choices must have been made by competent adult at time of drafting, and directives must be followed.
3. Health-care professional who cannot comply must make good-faith effort to transfer patient to another physician, physician assistant, or advanced practice registered nurse.
4. Directive does not have effect during patient's pregnancy. [Wis. Stat.](#) § 154.07(2).

NOTE: Most people who have a valid power of attorney for health care do not also execute a declaration to health-care professionals, primarily because the power of attorney for health care covers the same issues and others in substantial detail, and if the declaration is inconsistent the durable power of attorney for health care governs. Newer forms drafted by attorneys combine health-care power with living will to avoid this possibility of inconsistency.

The desires of a *competent* patient supersede the declaration at all times. If a patient is incompetent, the declaration governs. [Wis. Stat.](#) § 154.07(2).

XVII. UNIFORM CUSTODIAL TRUST ACT [§ 19.885]

NOTE: The Uniform Custodial Trust Act became effective on May 11, 1992, and was updated and revised in 2005 under [Wis. Stat.](#) ch. 54. Because the Act has received little examination by attorneys, it is unclear under what circumstances using the Act's provisions would benefit the ward. Until the Act and its relationship to other Wisconsin statutory provisions related to trusts are better understood, attorneys with general practices who seek to create custodial trusts should continue to use existing guidelines for the creation of trusts. [Wis. Stat.](#) §§ 54.950–988.

The only Wisconsin case relating to the use of the uniform custodial trust is *In re Disciplinary Proceedings Against Strassburg*, 217 Wis. 2d 318 (1998), relating to inappropriate use of the custodial trust.

A. In General [§ 19.886]

1. Custodial trust of property may be created by either of the following:

- a. Written transfer of property to another person, with transferor named as beneficiary and transferee designated as custodial trustee. [Wis. Stat.](#) §§ 54.952, 54.984.
 - b. Written declaration, with individual other than declarant named as beneficiary and declarant named as custodial trustee. [Wis. Stat.](#) §§ 54.952, 54.984.
2. Under [Wis. Stat.](#) § 54.986(1), law applies to transfer or declaration creating custodial trust if at time of transfer
 - a. Transferor, beneficiary, or custodial trustee is resident of Wisconsin;
 - b. Transferor, beneficiary, or custodial trustee has principal place of business in Wisconsin;
or
 - c. Custodial trust property is located in Wisconsin.

B. Specific Duties and Authority of Custodial Trustee [§ 19.887]

1. Custodial trustee acting in fiduciary capacity has all rights and powers over custodial property that unmarried adult owner has over individually owned property. [Wis. Stat.](#) § 54.964.
2. Custodial trustee must follow non-incapacitated beneficiary's directions regarding management, control, investment, or retention of property; obligation starts as soon as custodial trustee has been given express or implied consent to act. [Wis. Stat.](#) §§ 54.964(2), 54.956.
3. Custodial trustee is subject to personal jurisdiction of court for any matter relating to custodial trust. [Wis. Stat.](#) § 54.956(3).
4. No bond or security required of custodial trustee. [Wis. Stat.](#) § 54.976(3).
5. Custodial trustee entitled to reimbursement for reasonable expenses and has noncumulative election to be made no later than six months after close of calendar year to charge reasonable expenses for services performed during year. [Wis. Stat.](#) § 54.976(1), (2).
6. Acceptance of trust may be set forth in writing; statutory form may be used. [Wis. Stat.](#) § 54.956(2).
7. On acceptance, trustee must provide written statement as to trust property to be managed, furnish annual accounting, and account to beneficiary or legal representative upon reasonable request; final accounting is required upon trustee's resignation or removal or upon termination of trust. [Wis. Stat.](#) § 54.978.

C. When Beneficiary Is Incapacitated [§ 19.888]

1. Exercise of durable power of attorney for incapacitated beneficiary not effective to terminate or to direct administration or distribution of custodial trust. [Wis. Stat.](#) § 54.962(6).
2. Custodial trustee may expend so much of custodial property as considered advisable for use or benefit of incapacitated beneficiary and incapacitated beneficiary's dependents. [Wis. Stat.](#) § 54.966(2).

3. Trust will be administered as if for incapacitated beneficiary if any of the following are true:
 - a. Custodial trust was created under [Wis. Stat. § 54.958](#). [Wis. Stat. § 54.968\(1\)\(a\)](#).
 - b. Transferor has directed that trust be administered for incapacitated beneficiary. [Wis. Stat. § 54.968\(1\)\(b\)](#).
 - c. Under [Wis. Stat. § 54.968\(1\)\(c\)](#), custodial trustee has determined that beneficiary is incapacitated in reliance on any of the following:
 - (1) Previous direction or authority given by the beneficiary while not incapacitated. [Wis. Stat. § 54.968\(2\)\(a\)](#).
 - (2) Certificate of beneficiary's physician. [Wis. Stat. § 54.968\(2\)\(b\)](#).
 - (3) Other persuasive evidence. [Wis. Stat. § 54.968\(2\)\(c\)](#).
4. [Wis. Stat. § 54.968\(4\)](#) provides that court will determine whether beneficiary is incapacitated on petition of
 - a. Beneficiary,
 - b. Custodial trustee, or
 - c. Interested person.
5. Unless otherwise directed, person who owes debt to or holds property for incapacitated beneficiary who does not have conservator or guardian of estate may make transfer to adult member of incapacitated beneficiary's family or to custodial trustee. [Wis. Stat. § 54.958\(1\)](#).
 - a. If value of debt or property exceeds \$10,000, court must authorize transfer.
 - b. Written acknowledgment of delivery is sufficient receipt and discharge for property. [Wis. Stat. § 54.958\(2\)](#).
6. Custodial trust created for multiple beneficiaries must be treated as if separate trusts of equal undivided interests for each beneficiary had been created, and separate accounting must be made to each beneficiary. [Wis. Stat. § 54.960\(2\)](#).
7. Right of survivorship only if beneficiaries are spouses. [Wis. Stat. § 54.960\(1\)](#).

D. Termination of Custodial Trust [§ 19.889]

1. If not previously terminated, custodial trust terminates on death of beneficiary. [Wis. Stat. § 54.952\(5\)](#).
2. Transferor may not terminate custodial trust. [Wis. Stat. § 54.952\(4\)](#).

3. Non-incapacitated beneficiary or conservator or guardian of estate for incapacitated beneficiary may terminate custodial trust. [Wis. Stat.](#) § 54.952(5).
4. [Wis. Stat.](#) § 54.982(1) provides that upon termination by beneficiary, conservator, or guardian, custodial trustee will transfer unexpended custodial trust to either of the following:
 - a. Living, non-incapacitated beneficiary. [Wis. Stat.](#) § 54.982(1)(a).
 - b. Conservator, guardian of estate, or other recipient designated by court for incapacitated beneficiary. [Wis. Stat.](#) § 54.982(1)(b).
5. [Wis. Stat.](#) § 54.982(2) provides that upon termination by death, custodial trustee must distribute unexpended custodial trust property in following order:
 - a. As last directed in writing signed by deceased beneficiary while not incapacitated; writing must be received by custodial trustee during beneficiary's life.
 - b. To survivor of multiple beneficiaries if survivorship provided for under [Wis. Stat.](#) § 54.960.
 - c. As designated in instrument creating custodial trust.
 - d. To estate of deceased beneficiary.
6. If distributee is incompetent, custodial trust continues for benefit of distributee. [Wis. Stat.](#) § 54.982(3).
7. Death of beneficiary does not terminate power of custodial trustee to discharge obligations of custodial trustee or beneficiary to pay bills incurred before termination of custodial trust. [Wis. Stat.](#) § 54.982(4).

XVIII. UNIFORM ADULT GUARDIANSHIP JURISDICTION [§ 19.890]

NOTE: The Uniform Adult Guardianship Jurisdiction Act (UAGJA), which became effective April 5, 2018, is codified at [Wis. Stat.](#) ch. 53. Because the UAGJA and chapter are relatively new, they have received little attention from attorneys, and it is unclear how courts will interpret or implement the provisions.

A. In General [§ 19.891]

[Wis. Stat.](#) ch. 53 applies to the process of determining jurisdiction over the person for a guardianship proceeding. Its purpose is to resolve potential conflicts regarding jurisdiction between states and make uniform the laws between those states. [Wis. Stat.](#) § 53.01.

B. Communication Between Courts [§ 19.892]

1. Wisconsin courts may communicate with courts in other states concerning guardianship proceedings. [Wis. Stat.](#) § 53.04.

2. The court may allow the parties to participate in the communication and must make a record of the communication. This record may be limited to the fact the communication occurred. [Wis. Stat. § 53.04\(1\)](#).
3. If the communication pertains to schedules, calendars, court records, or other administrative matters, the court is not required to make a record. [Wis. Stat. § 53.04\(2\)](#).
4. If the other jurisdiction is a foreign country, the Wisconsin court, in applying UAGJA, may treat that foreign country as if it were a state. [Wis. Stat. § 53.03](#)

C. Cooperation Between Courts [§ 19.893]

1. A Wisconsin court may request the appropriate court of another state to do any of the following:
 - a. Hold an evidentiary hearing. [Wis. Stat. § 53.05\(1\)\(a\)](#).
 - b. Order a person in that state to produce evidence or give testimony under that state's procedures. [Wis. Stat. § 53.05\(1\)\(b\)](#). Such testimony may be in the form of a deposition, by telephone, or by audiovisual or other electronic means, as well as other means allowed in Wisconsin. [Wis. Stat. § 53.06](#).
 - c. Order that an evaluation or assessment of the respondent be made. [Wis. Stat. § 53.05\(1\)\(c\)](#).
 - d. Order an appropriate investigation of any person involved in the proceeding. [Wis. Stat. § 53.05\(1\)\(d\)](#).
 - e. Forward to the court a certified copy of the transcript or other record of a hearing or proceeding as well as any evidence otherwise produced and any evaluation or assessment prepared. [Wis. Stat. § 53.05\(1\)\(e\)](#).
 - f. Issue an order necessary to ensure the appearance of a necessary person. [Wis. Stat. § 53.05\(1\)\(f\)](#).
 - g. Issue an order releasing medical, financial, criminal, or other relevant information, including protected health information. [Wis. Stat. § 53.05\(1\)\(g\)](#).
2. When a court of another state seeks the assistance of a Wisconsin court as above, the Act authorizes the Wisconsin court to grant the request or make efforts to comply with the request. [Wis. Stat. § 53.05\(2\)](#)

D. Circumstances in Which Wisconsin Has Jurisdiction Over the Person [§ 19.894]

1. According to [Wis. Stat. § 53.23](#), a Wisconsin court has personal jurisdiction to appoint a guardian of the person or estate if any of the following is true:
 - a. Wisconsin is the *home state*, defined as either of the following:

- (1) The state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition; or
 - (2) If there is no such state for the respondent, the state in which the respondent was physically present, including any period of temporary absence, for six consecutive months ending within the six months before the filing of the petition. [Wis. Stat.](#) §§ 53.23(1), 53.02(7).
- b. On the date the petition is filed, Wisconsin is a significant-connection state and either of the following is true:
- (1) The respondent does not have a home state or a court in the home state has declined to exercise jurisdiction because Wisconsin is more appropriate (see [Wis. Stat.](#) § 53.26(3) for factors determining appropriate forum).
 - (2) The respondent has a home state, a petition or order is not pending in the home state or significant-connection state, and before Wisconsin issues an order; no order or petition is issued in the home state; no objection is made or the objector does not establish that exercising jurisdiction would be contrary to the ward's best interests; and Wisconsin concludes it is an appropriate forum. [Wis. Stat.](#) § 53.23(2).
- c. Wisconsin does not have jurisdiction as above but the home state or significant-connection state declines jurisdiction because Wisconsin is more appropriate and taking jurisdiction is consistent with constitutional concepts. [Wis. Stat.](#) § 53.23(3).
2. Special jurisdiction—If Wisconsin lacks personal jurisdiction as above, the court may still appoint a temporary guardian, issue an order with respect to real or tangible personal property located in Wisconsin, or appoint a guardian for an individual for whom a provisional order to transfer the guardianship from another state has already been issued, but the court must dismiss the proceeding at the request of the home state. [Wis. Stat.](#) § 53.24.
 3. If the Wisconsin court determines it acquired jurisdiction through unjustifiable conduct, the Wisconsin court may decline to exercise jurisdiction, exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to protect the respondent or his or her property, or continue jurisdiction. [Wis. Stat.](#) § 53.27.
 4. If a petition for guardianship is brought in Wisconsin and Wisconsin is not the home state, notice must be given to those persons who would be entitled to notice in the home state in addition to those persons in Wisconsin entitled to notice. [Wis. Stat.](#) § 53.28.

E. Transferring the Guardianship Between States [§ 19.895]

1. A guardian appointed in Wisconsin may petition the court to transfer the guardianship to another state. [Wis. Stat.](#) § 53.31(1). The guardian must give notice to persons entitled to notice under [Wis. Stat.](#) § 54.38. [Wis. Stat.](#) § 53.31(2).
2. The court, on its own motion or at the request of the guardian, the ward, or an interested party, must hold a hearing on a petition to transfer the guardianship. [Wis. Stat.](#) § 53.31(3).

3. Under [Wis. Stat.](#) § 53.31(4), the court must provisionally grant the petition and direct the guardian to petition for guardianship in the other state if the court is satisfied the guardianship will be accepted in the other state and if all the following are satisfied:
 - a. The ward is physically present in the other state or is reasonably expected to move permanently to the other state.
 - b. No objection is made or if one is made, the objector fails to show the transfer is contrary to the ward's interests.
 - c. If a guardianship of the person, plans for the care and services for the ward are reasonable and sufficient in the other state; if a guardian of the estate, adequate arrangements will be made for the management of property.
4. The court must issue a final order confirming the transfer and terminating the guardianship once it receives a provisional order from the other state accepting the proceeding and receives the necessary documents to terminate the guardianship in Wisconsin. [Wis. Stat.](#) § 53.31(5).

F. Accepting Guardianship from Another State [§ 19.896]

The guardian must petition Wisconsin to transfer a guardianship to Wisconsin. The petition must include a certified copy of the other state's provisional order and a proposed order specifying the powers to be granted in Wisconsin and a sworn statement that the proposed order is consistent with the authority granted in the other state. [Wis. Stat.](#) § 53.32.

1. Notice must be given to those persons entitled to notice in both the transferring state and Wisconsin. [Wis. Stat.](#) § 53.32(2).
2. The court must hold a hearing on its own motion or if requested by the ward or interested party. [Wis. Stat.](#) § 53.32(3).
3. The court must provisionally issue an order granting the petition unless an objection is made and the objector establishes that transfer is contrary to the ward's interests, the proposed powers significantly expand the powers granted to the guardian, or the guardian is ineligible for appointment in Wisconsin. [Wis. Stat.](#) § 53.32(4).
4. The court must issue a final order appointing a guardian upon receipt of a final order from the other state transferring the guardianship and must determine within 60 days after the final order whether the guardianship must be modified to conform with Wisconsin law. If the guardian's powers are expanded in the final order, the court must hold a hearing in conformity with [Wis. Stat.](#) § 54.63.
5. If the court refuses to accept transfer of the guardianship from another state, the guardian may still petition for guardianship in Wisconsin if Wisconsin has jurisdiction. [Wis. Stat.](#) § 53.32(8).
6. The court may appoint a GAL at any point to assist the court but must appoint a GAL if an objection to the transfer is made. [Wis. Stat.](#) § 53.32(9).
7. See *Grant Cnty. Dep't of Soc. Servs. v. Unified Bd. (In re Guardianship of Jane E.P.)*, 2004 WI App 153, 275 Wis. 2d 680, vacated and remanded, 2005 WI 106, 283 Wis. 2d 258.

The court in *Jane E.P.* set forth the principles of comity and set forth standards for courts to consider in determining which court should proceed to judgment and which should cede jurisdiction. Courts must work together to further dignity of judicial system and to promote orderly administration of justice in cases of interstate guardianship fees. Goals include the following:

- a. Communication and cooperation between courts involved,
- b. Screening and careful review of petition,
- c. Transfer of guardianship if transfer is determined to be in ward's best interest and within a reasonable time with proper notice to ward and interested partner,
- d. Receipt and acceptance of a transferred guardianship within a reasonable time, and
- e. Initial hearing in the court accepting transferred guardianship—review should be conducted within 90 days.

G. Registration and Recognition of Orders from Other States [§ 19.897]

1. The appointed guardian may register the guardianship of another state in Wisconsin by filing certified copies of the order and letters of office, as well as any bond, as a foreign judgment. The guardian must give notice to the appointing court of the intent to register. There can be no pending petition in Wisconsin. [Wis. Stat.](#) §§ 53.41, 53.42.
2. Upon registration of a guardianship from another state, the guardian may exercise in Wisconsin all the powers and authorities in the order except those prohibited by Wisconsin law. [Wis. Stat.](#) § 53.43.

Chapter 20

Medicaid Divestment

Margaret Wrenn Hickey

Heather B. Poster

Becker, Hickey & Poster, S.C.

Milwaukee

NOTE: Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Apr. 2022, No. 796; all references to the United States Code (U.S.C.) and Internal Revenue Code (I.R.C.) are current through Pub. L. No. 117-127 (May 16, 2022); all references to the Code of Federal Regulations (C.F.R.) and Treasury regulations (Treas. Reg.) are current through 87 Fed. Reg. 30,092 (May 17, 2022); and all references to the *Medicaid Eligibility Handbook* are current through Release 22-01 (Apr. 4, 2022).

I. INTRODUCTION [§ 20.898]

A. In General [§ 20.899]

1. Medicare and private insurance cover very little, if any, nursing home care; because only wealthy persons can afford long-term nursing home care, some people want to give their assets to their children or others and go on Medicaid (also called medical assistance (MA) or Title XIX) as soon as possible instead of depleting all their assets.
2. *Divestment* is the act of giving away one's property without receiving adequate consideration in a way that affects eligibility for MA.
 - a. Medicaid is a welfare program jointly funded by federal and state governments that provides payment for medical expenses, including some nursing home care.
 - b. Most nursing homes in Wisconsin participate in Medicaid, although their participation is voluntary.
 - c. Currently, Medicaid is the funding source for at least 70% of all nursing home residents (some residents enter nursing homes already eligible; others qualify after spending all their own resources).
 - d. Medicaid does not cover personal or residential care, commonly referred to as custodial care and categorized as intermediate care facility (ICF) levels 3 and 4, but it does cover skilled care and intermediate (ICF 1) and limited (ICF 2) levels of care provided in nursing homes, some residential facilities, or at home. [Wis. Stat.](#) § 49.45(6m)(a)3., 5.; [Wis. Admin. Code](#) § DHS 132.13(7), (10), (31).
3. Divestment may cause ineligibility for Medicaid benefits because the state wishes to discourage persons from intentionally transferring assets to gain access to program designed to serve truly needy persons.
4. Federal law could impose criminal penalties on persons who, for a fee, knowingly and willfully counsel or assist an individual to dispose of assets for the individual to become eligible for Medicaid when transfer results in imposition of period of ineligibility; law also applies to persons who aid or abet. No known prosecutions have occurred. 42 [U.S.C.](#) § 1320a-7b(a)(6); see also *Peebler v. Reno*, 965 F. Supp. 28 (D. Or. 1997).

NOTE: A federal district court in New York enjoined enforcement of this provision as an unconstitutional infringement of First Amendment rights. *New York State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998); cf. *Magee v. United States*, 93 F. Supp. 2d 161 (D.R.I. 2000).

B. Resources [§ 20.900]

1. 2 Sara B. Andrew et al., [Advising Older Clients and Their Families](#) ch. 11 (State Bar of Wis. 4th ed. 2021) (Medicaid).

2. Margaret W. Hickey et al., Using Special Needs Trusts for Disabled Beneficiaries (State Bar of Wis. CLE Seminar 2008) (on file with authors) [hereinafter Using Special Needs Trusts for Disabled Beneficiaries].
3. State Bar of Wis., Build Your Practice: An Introduction to Elder Law (2021) (available as on-demand seminar).
4. State Bar of Wis., Legal Issues of the Aging (2021) (available as on-demand seminar).
5. State Bar of Wis., WisPACT Update (2021) (available as on-demand seminar).

C. Practical and Ethical Considerations [§ 20.901]

1. Attorney's own sense of morality or politics (e.g., regarding governmental benefits) should not affect legal advice given.
2. Attorney should be aware of potential conflicts of interest.
 - a. Attorney must determine whom he or she represents and whether there are family conflicts.
 - b. Divestor must be competent to divest or have an agent who is authorized to make gifts; note that guardian may divest on ward's behalf, including making transfers to trust, but only with court approval. [Wis. Stat.](#) §§ 54.20(2), 54.21, 54.22; *see also V.D.H. v. Circuit Ct. for Ozaukee Cnty. (In re Guardianship of F.E.H.)*, 154 Wis. 2d 576 (1990); *Marjorie A.G. v. Dodge Cnty. Dep't of Hum. Servs. (In re Guardianship of Scott G.G.)*, 2003 WI App 52, 261 Wis. 2d 679; *Michael S.B. v. Berns (In re Guardianship of Stanley B.)*, 196 Wis. 2d 920 (Ct. App. 1995).
3. Attorney should ensure that any power of attorney used
 - a. Is durable. *See* [Wis. Stat.](#) ch. 244.
 - b. Is either general or specific.
 - c. Provides for gifting, if desired. *See Praefke v. American Enter. Life Ins. Co.*, 2002 WI App 235, 257 Wis. 2d 637; *see also Russ v. Russ*, 2007 WI 83, 302 Wis. 2d 264.
 - (1) Otherwise, breach of fiduciary duty may occur.
 - (2) Gifting provisions should be narrowly drawn for tax reasons and protection of principal's assets.
4. Attorney should fully advise divestor or legal representative of divestment hazards.
 - a. Divestor will no longer control divested property; loss of autonomy may be difficult.
 - (1) If divestment is made before divestor needs long-term care, divestor may run out of funds for living expenses outside institution (including home care).

- (2) If divestment is unsuccessful and divestor needs long-term care, divestor will have no means to pay for nursing home care and for care in other settings.
 - (3) Divestor may lose freedom to select particular nursing home or community-based residential facility because many facilities do not accept Medicaid for payment or have a required period of private pay.
 - b. Divestee, unless divestor's spouse, is not legally obligated to financially assist divestor if divestor is ineligible for Medicaid coverage or coverage is lost.
 - c. Divestor will be on welfare and thus subject to periodic reviews and invasions of privacy.
 - d. Future Medicaid benefits may be limited or eliminated by new federal and state laws.
 - e. Federal and state laws regarding eligibility may change before application; laws may be retroactive.
5. Criminal penalties potentially exist for attorneys who counsel or assist divestment, *see supra* § [20.2](#); however, no known cases have been brought.
6. Nursing homes, community-based residential facilities, residential care apartment complexes (formerly assisted living facilities), and other facilities may be decertified from Medicaid participation or may voluntarily terminate their certification at any time.
- a. Elderly or disabled nursing home residents on Medicaid may be evicted and thereby may suffer "transfer trauma."
 - b. Medicaid provisions do not confer right to continued residence in nursing home of person's choice. 42 [U.S.C.](#) § 1396a(a)(23).
 - c. Nursing home residents have no constitutionally protected interest to due-process hearing before decision by state Department of Health Services (DHS) to decertify nursing home. However, residents may have a right, under 42 [U.S.C.](#) § 1396a(a)(23), to challenge in federal court an involuntary decertification of a nursing home. *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773 (1980); *Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012).
 - d. Resident has no implied contractual right to stay in nursing home that voluntarily terminates its Medicaid contract unless nursing home is estopped because it has represented that it will keep resident until resident's death.
 - e. Admission agreement may create explicit contractual assurance that nursing home will maintain Medicaid certification.
7. Medicaid patient may be transferred to lower level of care (including discharge) than patient or patient's doctor feels is necessary, which might not be covered by Medicaid, with no due-process rights. *Blum v. Yaretsky*, 457 U.S. 991 (1982).
8. Wisconsin law provides minimal due-process rights in cases of removal or transfer. [Wis. Admin. Code](#) §§ DHS 132.53, DHS 132.54.

NOTE: Attorneys should be aware of “Medicaid discrimination” in access to nursing homes, quality of care, and intrafacility transfers.

D. Miscellaneous Considerations [§ 20.902]

1. Laws change frequently and policies are often implemented months before they are formalized in DHS, *Medicaid Eligibility Handbook*, available online only, at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm#t=home.htm> [hereinafter *M.E. Handbook*].
2. Operations Memos (cited in this chapter as Ops. Memo) are available at <https://www.dhs.wisconsin.gov/dms/memos/ops/index.htm>.
3. Policies are often oral or by letter, so there is no specification.
4. Local practices vary widely; important to know practices of county or even specific welfare office, particularly in regard to spousal contribution.
5. Some options exist for asset transfers, but each individual situation must be analyzed to determine whether assets may be *legally* transferred without incurring potentially lengthy period of ineligibility.
6. Medicaid is welfare; receipt of welfare does not generally create debt, except for statutory recovery programs.
 - a. In August 1991, Wisconsin enacted estate-claim and homestead-lien provisions for recovery by DHS of correctly paid Medicaid benefits; avoiding these provisions may be a strong motive for divesting. Recent statutory changes make divesting in the future, not just past divestments, subject to penalty. This right to recover was expanded to nonprobate assets and to 50% of surviving spouses’ assets, effective August 1, 2014. [Wis. Stat. § 49.455\(5\)\(d\)](#); 2013 Wis. Act 20, § 1066; Ops. Memos 13-39 (Nov. 12, 2013), 14-20 (June 4, 2014).
 - b. Laws providing for recovery of welfare are solely statutory and strictly construed; attorney must be careful in research because there are separate statutes for each program.
 - c. Recovery for Medicaid payments is further limited because it is dictated by federal statutes; state statutes incorporating federal laws allow for recovery only for incorrect payments or fraud during recipient’s lifetime.
 - d. State has expansive rights only in situations in which actual fraud has occurred.
7. Nursing homes may attempt to impose liability by contract (e.g., by requiring private payment for period of time); these contracts, termed *duration-of-stay contracts*, are illegal in Wisconsin and also might violate federal law. 42 [U.S.C. § 1320a-7b\(d\)\(2\)](#); [Wis. Stat. § 946.91\(5\)](#); 75 Wis. Op. Att’y Gen. 14 (1986), <https://www.doj.state.wi.us/dls/ag-opinion-archive> (click on “1981 - 1990”; then click on “1986”).

II. OVERVIEW OF MEDICAID PROGRAM [§ 20.903]

A. Nonfinancial Eligibility Conditions [§ 20.904]

See [Wis. Stat.](#) § 49.47.

1. Same as conditions for Supplemental Security Income (SSI) or Wisconsin Works (formerly AFDC) (i.e., age 65 or older, blind or disabled, or dependent minor child).
2. If under age 65 and not disabled, persons might be eligible for the BadgerCare Plus program under certain limited circumstances.

B. Financial Considerations [§ 20.905]

1. Medically needy persons usually are not eligible for SSI or Wisconsin Works cash assistance grants because their incomes are too high.
2. Elderly persons in nursing homes or in community placements usually are not eligible for SSI because they receive Social Security, but certain individuals are eligible for monthly SSI payment of no more than \$30.
 - a. Income may be spent down to pay medical bills and achieve eligibility for Medicaid (spend down is similar to deductible that must be met).
 - b. Resources must be exempt, completely used, successfully divested, or unavailable for eligibility to be obtained.
 - c. Exempt assets explained in sections [20.11–.17](#), *infra*.

C. Administration of State Medicaid Program [§ 20.906]

1. Administered by DHS.
2. Applications made through county agency (i.e., department of health and social services or department of social services, which are grouped into consortiums); person is considered to reside in county in which nursing home is located; however, those persons under guardianship and protective placement must submit application to the county overseeing guardianship and protective placement. [Wis. Admin. Code](#) § DHS 102.01(3).
3. Appeals handled by administrative fair hearings held in county where applicant or recipient resides or by telephone. [Wis. Stat.](#) ch. 227.
4. Judicial review is pursuant to Administrative Procedure Act, [Wis. Stat.](#) ch. 227, subch. III.

D. Sources of Law [§ 20.907]

1. Statutory. 42 [U.S.C.](#) § 1396a; 42 [U.S.C.](#) § 1396p; 42 [U.S.C.](#) § 1396r-5; 42 [U.S.C.](#) §§ 1381–1383f; [Wis. Stat.](#) §§ 49.43–.497.
2. Regulatory. 20 [C.F.R.](#) §§ 416.1201–.1266; 42 [C.F.R.](#) pts. 430–456; [Wis. Admin. Code](#) chs. DHS 101–107 (especially [Wis. Admin. Code](#) chs. DHS 102–103).

3. *M.E. Handbook, supra* § 20.5.

NOTE: Wisconsin must follow SSI statutes and regulations for eligibility determination (comparability). The Social Security Administration's (SSA) *Program Operations Manual System* (POMS) does not have the force of federal law, but Wisconsin uses POMS as a guidebook. POMS is available for public use at SSA offices and public libraries, and it is available online at <https://secure.ssa.gov/apps10/> (last visited May 18, 2022). 42 U.S.C. § 1396a(a)(10)(C)(i)(III).

III. EXEMPT AND NONEXEMPT ASSETS [§ 20.908]

A. In General [§ 20.909]

1. Exempt assets need not be divested; person may retain them and remain eligible for MA.
2. Nonexempt assets should be converted to exempt assets if possible.

NOTE: The federal Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) uses the term *assets*, which is defined to include resources and income but not exempt property. 42 U.S.C. § 1396p(c)(3).

B. Basic Classification of Assets [§ 20.910]

See Wis. Stat. § 49.47(4).

1. Homestead property or residence. Wis. Admin. Code § DHS 103.06(1), (4).
 - a. Home and land used and operated in connection with home are exempt.
 - b. Mobile homes and condominiums used as principal residences are exempt.
 - c. Net proceeds from sale of home are exempt three months for SSI-related MA if placed in escrow account in contemplation of purchasing another home.
 - d. Homestead property is exempt if occupied by spouse or dependent relative or if recipient expresses intent to return.
 - e. Wisconsin has a limitation on equity of \$750,000 in the house unless it is occupied by the person's spouse or child who is under age 21 or disabled. Wis. Stat. § 49.47(4)(bc)1.; see *M.E. Handbook, supra* § 20.5, § 16.8.1.4.
 - f. Under Wis. Stat. § 49.47(4)(bm) and *M.E. Handbook, supra* § 20.5, § 16.7.6, the entrance fee for a person who resides in a continuing-care retirement community or life-care community is considered available (and not exempt) if all the following apply:
 - (1) The person has the ability to use the entrance fee, or, even in part, the contract provides that the entrance fee may be used, to pay for care if the person's other resources or income are insufficient to pay for the care.

- (2) The person is eligible for a refund of any remaining entrance fee when the person dies or terminates the continuing-care retirement community or life-care community contract and leaves the community.
 - (3) The entrance fee does not confer an ownership interest in the continuing-care retirement community or life-care community.
2. Nonhomestead real property or nonbusiness income-producing property. [Wis. Admin. Code](#) § DHS 103.06(5).
 - a. Exempt if property's value with other assets does not exceed asset limit, *see infra* para. 7.
 - b. Not counted while listed for sale with real estate agent at fair market value; net proceeds of the sale are counted.
 - c. Exempt if income-producing assets are held in trade or business for self-support; no limit on value of assets. *See M.E. Handbook, supra* § [20.5](#), § 16.9.2.
 - d. Generally, a rental property will not be exempt even if it is producing income for self-support, unless held in a trade or business; DHS is refusing to recognize *Crow*, which overturned a decision in which the hearing examiner held the rental property did not qualify as a business asset. *See M.E. Handbook, supra* § [20.5](#), § 16.9.2; *see also* DHA Case No. 45-86382 (Wis. Div. Hearings & Appeals Nov. 19, 2007) (DHFS); MRA/145118 (Wis. Div. Hearings & Appeals Feb. 1, 2013) (DHS) (overturned by *Crow v. Wisconsin Dep't of Health Servs.*, No. 13CV0877 (Wis. Cir. Ct. Kenosha Cnty. Jan. 10, 2014). This makes it advisable to put estate into a limited liability company.
 - e. *M.E. Handbook* provides for other exclusions of nonbusiness property up to value of \$6,000. *M.E. Handbook, supra* § [20.5](#), §§ 16.9.3, 16.9.4.
3. Land contracts. [Wis. Admin. Code](#) § DHS 103.06(14); *see M.E. Handbook, supra* § [20.5](#), § 16.7.12.
 - a. Value of vendor's interest in land contract counts toward asset limit.
 - b. Vendor's interest is considered unavailable if applicant or recipient provides written documentation that interest is unsalable.
4. Life estate. [Wis. Admin. Code](#) § DHS 103.06(6).
 - a. Exempt if life estate is in homestead; however, if person leaves property and property is sold, proceeds are nonexempt assets.
 - b. Life estate is unavailable asset if in nonhomestead property.
 - c. Life estate valued as of date of transaction; proceeds from sale of life estate count toward nonexempt-asset limit.
 - d. Effective for life estates purchased on or after January 1, 2009, for the life estate to be exempt the owner of the life estate must have lived in the property for at least one year and received fair market value for the purchase. [Wis. Stat.](#) § 49.453(4m); *see, e.g., Estate*

of *Hagenstein v. Wisconsin Dep't of Health & Fam. Servs.*, 2006 WI App 90, 292 Wis. 2d 697; see also *M.E. Handbook*, *supra* § [20.5](#), § 17.2.7.14.

- e. Life estates are subject to estate recovery under [Wis. Stat.](#) § 49.496(1)(cm). Ops. Memo 14-20 (June 4, 2014).
5. Household and personal possessions. [Wis. Admin. Code](#) § DHS 103.06(8).
 - a. For SSI-related individuals, exempt if of reasonable value (up to \$2,000). 20 [C.F.R.](#) § 416.1216.
 - b. For institutionalized spouses who have *community* (noninstitutionalized) spouses, total value is exempt. [Wis. Stat.](#) § 49.455(1)(e).
 6. Motor vehicles. [Wis. Stat.](#) § 49.455(1)(e); 20 [C.F.R.](#) § 416.1218.
 - a. One vehicle per household is excluded regardless of value if it is used for transportation of the eligible individual or couple or a member of the eligible individual's or couple's household. [Wis. Admin. Code](#) § DHS 103.06(2); *M.E. Handbook*, *supra* § [20.5](#), § 16.7.9.2.
 - b. Caseworker must assume that the vehicle is used for transportation.
 - c. Additional vehicles used by eligible individual or couple are counted toward asset limit unless they can be excluded under another provision, such as vehicles used in a trade or business or essential to self-support.
 - d. When an eligible individual or couple owns more than one vehicle, caseworker must apply exclusion in a manner that is most advantageous to the individual or couple. *M.E. Handbook*, *supra* § [20.5](#), § 16.7.9.2.
 - e. The equity value of nonexempt vehicles is used for purposes of asset calculations. [Wis. Stat.](#) § 49.47(4)(b)2m.a.; *M.E. Handbook*, *supra* § [20.5](#), § 16.7.9.2.
 7. Nonexempt assets. [Wis. Stat.](#) § 49.47(4)(b)3g., 3m.
 - a. For individual, not counted if total value does not exceed \$2,000.
 - b. For married couple when neither spouse is in nursing home, not counted if total value does not exceed \$3,000, unless spousal impoverishment applies, see *infra* § [20.15](#).
 8. Additional tangible personal property. [Wis. Stat.](#) § 49.47(4)(b)4.
 - a. Exempt if of reasonable value and used to produce income.
 - b. Must consider number of family members.
 9. Trusts. [Wis. Admin. Code](#) § DHS 103.06(7).

- a. OBRA 1993 repealed the federal law on which Wisconsin's "medical assistance qualifying trust rule," see [Wis. Stat.](#) § 49.45(23) (1991–92), was based. [Wis. Stat.](#) § 49.45(23) was repealed by 1993 Wis. Act 437. The following information found in the former Wisconsin Administrative Code § HSS 103.06(7) (Mar. 1993) applied only to trusts in existence before August 10, 1993; that rule has been repealed.
- (1) Trust assets considered available to grantor and grantor's spouse to maximum extent of any discretion that trustee is authorized to exercise if grantor or grantor's spouse is trust beneficiary. *Estate of Furgason v. Wisconsin Dep't of Health & Soc. Servs.*, 211 Wis. 2d 732 (Ct. App. 1997); *Zimmerman v. Wisconsin Dep't of Health & Soc. Servs.*, 169 Wis. 2d 498 (Ct. App. 1992).
 - (2) Testamentary trusts excluded; *Will of Wright* trusts are considered available assets only to extent of trust's actual distributions, not to maximum extent of trustee's discretion. *State Dep't of Pub. Welfare v. First Nat'l Bank of Chippewa Falls (In re Will of Wright)*, 12 Wis. 2d 375 (1961).
- b. [Wis. Admin. Code](#) § DHS 103.06(7) relating to trusts has not been revised to incorporate OBRA 1993 changes.
- c. [Wis. Stat.](#) § 49.454 incorporates provisions of OBRA 1993 effective for trusts established on or after August 10, 1993. [Wis. Stat.](#) § 49.454.
- (1) Generally, trust funds are considered available assets.
 - (2) Revocable trusts
 - (a) Corpus is considered available asset.
 - (b) Payments to or for individual's benefit are deemed income.
 - (c) Any payments to person other than individual are considered divestment subject to 60-month look-back period.
 - (3) Irrevocable trusts
 - (a) If payments may be made under any circumstances to or for individual's benefit, total amount of any such payments is considered an available asset or income.
 - (b) Corpus of irrevocable income-only trust is not considered available asset. *But see Hedlund v. Wisconsin Dep't of Health Servs.*, 2011 WI App 153, 337 Wis. 2d 634 (finding trust created for the benefit of parents was an available asset, because parents gifted assets to children the same day trust was created and funded with same assets).
 - (c) Payments from available corpus or income to or for the individual's benefit are income.
 - (d) Payment other than to the individual is divestment and is subject to 60-month look-back period. 42 [U.S.C.](#) § 1396p(c)(1)(B)(i).

- (e) Any portion of trust from which no payment could be made to the individual under any circumstances is considered to have been divested as of date of establishment of trust or such later date as payment is foreclosed (*trigger trust*) and is subject to 60-month look-back period. 42 [U.S.C.](#) § 1396p(c)(1)(B)(i).
 - d. OBRA 1993 and [Wis. Stat.](#) § 49.454 created four new kinds of exempt trusts, the so-called (d)(4) trusts, which include payback and pooled trusts, by cross-reference to 42 [U.S.C.](#) § 1396p(d)(4). *See* Using Special Needs Trusts for Disabled Beneficiaries, *supra* § [20.3](#).
 - e. According to *M.E. Handbook*, *supra* § [20.5](#), § 16.6.5, a trust established for a disabled person is not divestment if the trust meets all the following conditions:
 - (1) The trust is established for sole benefit of disabled person.
 - (2) Trust is established with resources of disabled person.
 - (3) Trust contains provision that upon beneficiary's death, Wisconsin Medicaid will receive all amounts remaining in the trust not in excess of total amount of Medicaid paid on beneficiary's behalf.
10. Burial trusts and burial assets. 42 [U.S.C.](#) § 1382b(a)(2)(B), (d); 20 [C.F.R.](#) § 416.1231.
- a. Up to \$4,500 in irrevocable burial trust is exempt; for married recipient with community spouse, anything set aside for burial is exempt but must be documented with dated and signed statement and costs substantiated by itemized statement from funeral home; interest accumulated on that amount also is exempt as long as burial trust is irrevocable or burial fund is separately identifiable. [Wis. Stat.](#) §§ 445.125(1)(a), 49.47(4)(b)3., (k); *M.E. Handbook*, *supra* § [20.5](#), § 16.5.1; Ops. Memo 14-34 (Aug. 13, 2014).
 - b. If *burial fund* is chosen, may reduce or eliminate life insurance exemption, *see infra* para. 12.
 - c. *Burial spaces*, including burial plots, caskets, vaults, headstones, or agreements to purchase these items, also are exempt but must be prepurchased and irrevocable.
 - d. Burial insurance policies that have no cash value are not counted but are not licensed for sale in Wisconsin. 20 [C.F.R.](#) § 416.1230; *M.E. Handbook*, *supra* § [20.5](#), § 16.5.2.
 - e. Determination of countable-asset or divestment amount of life insurance-funded burial contracts depends on whether assignment option of contract is revocable or irrevocable, *see infra* para. 12.d. *M.E. Handbook*, *supra* § [20.5](#), § 16.5.3.
11. Loan proceeds are not exempt if available for current living expenses. [Wis. Admin. Code](#) § DHS 103.06(9).

NOTE: Proceeds from reverse mortgage are treated as assets in the month received and thereafter; undisbursed funds are not counted as assets. [Wis. Stat.](#) § 138.058; *M.E. Handbook*, *supra* § [20.5](#), § 16.7.2.1.

12. Life insurance policies. [Wis. Admin. Code](#) § DHS 103.06(10); *M.E. Handbook, supra* § [20.5](#), § 16.7.5; Ops. Memo 13-38 (Nov. 7, 2013).

- a. For SSI-related persons, exempt if total face value of all whole life policies owned does not exceed \$1,500; term insurance without cash-surrender value and death benefits are not counted.

CAUTION: Paid-up additions may cause the face value to exceed the exempt amount. All such additions will be added to face value under [Wis. Stat.](#) § 49.47(4)(b)2.

- b. If face value is greater than \$1,500, entire cash value, minus any loans, is offset against nonexempt-asset exemption (i.e., subtracted from cash-exemption limit, *see supra* para. 7.).
- c. \$1,500 face-value limit reduced, dollar for dollar, by amount held in burial fund (not irrevocable burial trust).
- d. Life insurance-funded burial contracts. *M.E. Handbook, supra* § [20.5](#), § 16.5.3.
 - (1) If irrevocably assigned, the burial spaces, *see supra* para. 10.c., are exempt, but the funds for payment of funeral or burial services are exempt only to the extent that the burial funds exclusion of \$1,500 has not otherwise been fully applied, *see supra* para. 12.c. *M.E. Handbook, supra* § [20.5](#), § 16.5.3.1.

NOTE: The burial funds exclusion of \$1,500, not the irrevocable burial trust exclusion of \$4,500, is applied, *see supra* para. 10.a.

- (2) If revocably assigned, the cash-surrender value is considered an available asset, except to the extent that the life insurance exemption is not otherwise used, *see supra* para. 12.b., and no exclusion for burial spaces is applied. *M.E. Handbook, supra* § [20.5](#), § 16.5.3.2.

13. Jointly held property. [Wis. Admin. Code](#) § DHS 103.06(3)(b).

NOTE: This section might not apply to married couples when one spouse is institutionalized (for those situations, see section [20.15, infra](#)); also, Wisconsin's rule as presently interpreted is more restrictive than the comparable SSI rule.

- a. Not available if
 - (1) Other owner refuses to sell property, and
 - (2) Other owner is not MA applicant or recipient's legally responsible relative.
- b. If property is available, then value is divided equally between joint owners.

14. Joint bank accounts. [Wis. Admin. Code](#) § DHS 103.06(3)(a).

NOTE: The information in this section might not apply to married couples when one spouse is institutionalized; for those situations, see section [20.15, infra](#).

- a. Total value deemed available to each person listed as owner. *M.E. Handbook, supra* § [20.5](#), §§ 16.4.1.1, 16.4.1.2.
 - b. If all owners are eligible for Medicaid, value is divided proportionately among all owners.
15. Income-producing property used in trade or business. 42 [U.S.C.](#) § 1382b(a)(3).
- a. For EBD cases (persons who are elderly or blind or have a disability), excluded regardless of value or rate of return if business is currently operating for self-support of applicant or recipient. *M.E. Handbook, supra* § [20.5](#), § 15.6.3.1.
 - b. Business does not have to produce a return of 6% nor is excluded equity limited to \$6,000.

NOTE: [Wis. Admin. Code](#) § DHS 103.06(13) limits the exemption to blind or disabled persons, but the *M.E. Handbook, supra* § [20.5](#), § 15.6.3.1, correctly grants the exemption to all persons who are elderly, blind, or disabled and imposes no profitability test.

C. Special Classification of Assets for Unmarried Institutionalized Persons or When Spouse Institutionalized Before October 1, 1989 [§ 20.911]

See [Wis. Admin. Code](#) § DHS 103.06(1).

1. Include only assets owned by or actually available to applicant (i.e., assets of applicant's spouse are not included).
2. Under [Wis. Admin. Code](#) § DHS 103.06(1)(b), homestead property is exempt if
 - a. Home occupied by person's spouse or dependent relative (e.g., minor child or developmentally disabled child); or
 - b. Person subjectively intends to return home, regardless of reasonableness of that intent.

NOTE: Local agencies may be following an obsolete DHS regulation providing for objective evidence supporting the person's intent to return home, which has been deemed out of compliance by the Centers for Medicare and Medicaid Services.

D. Classification of Assets for Married Institutionalized Persons When Spouse Living in Community and Institutionalization Began on or After September 30, 1989 (Spousal Impoverishment) [§ 20.912]

See [Wis. Stat.](#) § 49.455(5)–(8).

1. Attribute resources at time of application for Medicaid. [Wis. Stat.](#) § 49.455(5)(b).
 - a. All resources of both spouses are considered available to institutionalized spouse *regardless of title ownership and regardless of Wisconsin's marital property law* ([Wis. Stat.](#) ch. 766), subject to community spouse's rights, *see infra* para. 2.

- b. After institutionalized spouse's first month of eligibility for Medicaid, community spouse's resources are not considered.
2. Protect community spouse's resources. [Wis. Stat.](#) § 49.455(5), (6).
 - a. Resources of institutionalized spouse and community spouse are considered together, regardless of who holds title, but work-related retirement benefit plans and individually owned retirement accounts (including IRAs, 401(k) plans, and 403(b) plans) of community spouse are excluded and not counted against asset limits; retirement assets in name of institutionalized spouse are counted as nonexempt assets. *Keip v. Wisconsin Dep't of Health & Fam. Servs.*, 2000 WI App 13, 232 Wis. 2d 380; *M.E. Handbook, supra* § [20.5](#), §§ 16.7.20, 18.4.
 - b. According to *M.E. Handbook, supra* § [20.5](#), § 18.4.3, community spouse may retain the largest of the following:
 - (1) One-half of the nonexempt assets of the couple computed as of beginning of first period of institutionalization lasting at least 30 days or the date the person was determined functionally eligible for Home and Community-Based Waivers, whichever is earlier, but not less than the first \$50,000 of assets and not more than \$137,400 (in 2022). *M.E. Handbook, supra* § [20.55](#), §§ 18.4.2, 18.4.3; Ops. Memo 21-23 (Nov. 23, 2021).
 - (2) Amount established at fair hearing.
 - (3) Amount transferred under court order.
 - c. If community spouse income is below protected amount, resource allocation is increased using an annuity projection to produce additional income after transfer of maximum amount of institutionalized spouse's income, *see infra* § [20.16](#), para. 4.
 - (1) Community spouse must agree to take minimum monthly maintenance needs allowance (MMMNA), *see infra* § [20.16](#), para. 4., from institutionalized spouse before increasing resource allocation. *Wisconsin Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473 (2002).
 - (2) Medicaid must first be denied and fair hearing requested to have resource allocation increased.
 - (3) Alternative to denial and fair hearing is a court order obtained through guardianship or family court action. [Wis. Stat.](#) § 49.455(4)(b)2.
 - d. Spousal refusal strategy in which the community spouse refuses to participate or provide information in the application process is no longer allowed. *See* 2013 Wis. Act 20; 2013 Wis. Act 92. This might be challenged in court as inconsistent with federal law, but no known challenges have occurred.

E. Income Calculations for Married Institutionalized Person with Spouse Living in Community [§ 20.913]

See [Wis. Stat.](#) § 49.455(3), (4).

1. In general
 - a. Applies to all Medicaid-eligible nursing home residents with spouses in community, regardless of when institutionalization began.
 - b. Provides income allowances for vast majority of spouses of institutionalized persons nationwide.
2. Attribution of income when applying for Medicaid eligibility: During any month that person is in institution, no income of community spouse is deemed available to institutionalized spouse. [Wis. Stat.](#) § 49.455(3)(a).
3. Attribution of income after Medicaid eligibility has been determined. [Wis. Stat.](#) § 49.455(3)(b).
 - a. Payment of income made solely to one spouse is considered available only to that spouse.
 - b. When payment of income is made in both spouses' names, one-half of income is considered available to each spouse.
 - c. When payment of income is made to either spouse or to both spouses *and* to another person or persons, income is considered available to each spouse in proportion to that spouse's interest (or, if payment is made to both spouses and no interest is specified, one-half of couple's proportion is considered available to each spouse).
 - d. Institutionalized spouse may rebut presumed interest in income by preponderance of evidence to the contrary or by provisions of written instrument.
4. Protect community spouse's income. [Wis. Stat.](#) § 49.455(4); *M.E. Handbook, supra* § [20.5](#), § 18.6.2.
 - a. Community spouse retains all income either received in his or her name alone or apportioned by provisions stated in paras. 3.b. and 3.c., *supra*.
 - b. From July 1, 2021, to June 30, 2022, standard MMMNA is \$2,903.34; this sum may be increased up to a maximum of \$3,435.00 for monthly housing and utility expenses exceeding \$871.00 (excess-shelter allowance). Changes, if any, to maximum amount take effect annually on July 1. Ops. Memo 21-13 (May 21, 2021).
 - c. Effective July 1, 2022, standard MMMNA is \$3,051.66 and excess-shelter allowance is \$915.50. Ops. Memo 22-05 (May 18, 2022).

NOTE: MMMNA includes any income of community spouse and is designed to bring his or her income up to minimum level.
 - d. MMMNA is adjusted annually by same percentage that consumer price index changes.
 - e. Supplement community spouse's income

- f. If community spouse's income is less than that allowed above, institutionalized spouse may assign income to community spouse to bring community spouse's income up to allowance level; additionally, community spouse may petition to increase resource allocation to produce sufficient income, *see supra* § [20.15](#), para. 2.c.(1).
 - g. If community spouse's income exceeds the allowance level, he or she will receive no income from institutionalized spouse.
 - h. Community spouse may receive larger amount by showing "exceptional circumstances resulting in financial duress" at fair hearing. The amount is based on the size of single-premium life annuity necessary to generate income shortfall. [Wis. Stat.](#) § 49.455(8)(c); Ops. Memo 13-38 (Nov. 7, 2013).
 - i. If court has entered support order for community spouse against institutionalized spouse, minimum income allowance may not be less than amount ordered by court.
5. Support obligation
- a. County agency may request community spouse to contribute to nursing home costs of a nursing home spouse if the nursing home spouse is not receiving Medicaid benefits under spousal-im impoverishment provisions. [Wis. Admin. Code](#) § DHS 103.07(1)(a)3.
 - b. If community spouse refuses, DHS may refer community spouse for support action.

F. Fair Hearing Rights [§ 20.914]

See [Wis. Stat.](#) § 49.455(3)(a), (8); *see also* *Chippewa Cnty. Dep't of Hum. Servs. v. Bush*, 2007 WI App 184, 305 Wis. 2d 181.

Either spouse may request a fair hearing to contest determination of community spouse's monthly income allowance, amount of monthly income otherwise available to community spouse, computation of spousal share of resources at time of institutionalization, attribution of resources at time of application, or determination of community spouse resource allowance (CSRA); hearing may result in increase in income or resource levels set for community spouse.

IV. TRANSFERS OCCURRING ON OR AFTER OCTOBER 1, 1993 [§ 20.915]

NOTE: In August 1993, both Wisconsin and the federal government changed the laws that relate to divestment; the Wisconsin changes (included in 1993 Wis. Act 16) were in effect since October 1, 1993; many of these changes were repealed by 1993 Wis. Act 437, which implemented federal changes from OBRA 1993; these changes are retroactive to October 1, 1993. The Wisconsin changes that became effective on October 1, 1993, made sweeping changes to divestment law. Additional significant changes were enacted by 2007 Wis. Act 20, and these became effective January 1, 2009. Another change occurred with 2013 Wis. Act 20, with revisions in 2013 Wis. Act 92. Finally, in 2021, Wisconsin substantially revised the divestment chapter (17) of the *Medicaid Eligibility Handbook*. *See M.E. Handbook, supra* § 20.5, ch. 17.

A. In General [§ 20.916]

1. Statutes and administrative code define exempt and nonexempt assets and circumstances under which transfer of assets qualifies as divestment. [Wis. Stat.](#) §§ 49.453, 49.454; [Wis. Admin. Code](#) § DHS 103.06.
2. Federal law also defines circumstances under which transfer of assets qualifies as divestment.
3. Look-back period. [Wis. Admin. Code](#) § DHS 103.065(4)(a).
 - a. Defined as the period before Medicaid application during which transfers will be scrutinized for possible divestments.
 - b. Look-back period begins when the individual is both institutionalized and has applied for long-term care Medicaid or has applied for a home- and community-based waiver or managed long-term care program. 42 [U.S.C.](#) § 1396p(c)(1)(B); [Wis. Stat.](#) § 49.453(1)(f); *M.E. Handbook, supra* § [20.5](#), § 17.3.
 - c. The worker must look back from the latter of the
 - (1) Institutionalized person's date of application or review, or
 - (2) Medicaid recipient's date of entry into the institution.
4. Calculation of amount divested: DHS determines total cumulative uncompensated value of all assets transferred during look-back period. [Wis. Stat.](#) § 49.453(3)(b)1.; *see also* 42 [U.S.C.](#) § 1396p(c)(1)(E)(i)(D).

NOTE: Previously, a Medicaid applicant could make up to 30 separate divestments during the look-back period. Wisconsin now combines multiple divestments (i.e., transfers whose periods of ineligibility occur during the look-back period) into single divestments.

5. Period of ineligibility
 - a. Number of days arrived at by dividing divested amount by average daily cost of nursing home care for private pay patient (\$307.40 as of January 1, 2022); period of ineligibility can be for partial months. [Wis. Stat.](#) § 49.453(3)(a); *M.E. Handbook, supra* § [20.5](#), § 17.5; Ops. Memo 21-22 (Nov. 23, 2021).
 - b. Under [Wis. Stat.](#) § 49.453(3)(a)2. and *M.E. Handbook, supra* § [20.5](#), § 17.3.3, for divestments occurring on or after January 1, 2009, the ineligibility period starts when the applicant has done all the following:
 - (1) Applied for institutional Medicaid or requested one of the community waivers programs.
 - (2) Entered an institution or meets the appropriate level of care and functional screen criteria.
 - (3) Meets all other Medicaid nonfinancial and financial eligibility requirements.

- c. 2013 Wis. Act 20 changed the penalty period start date for post-eligibility divestment to the first day of the first month after timely notice is given to the Medicaid recipient. [Wis. Stat.](#) § 49.453(3)(ag); *M.E. Handbook, supra* § [20.5](#), § 17.3.4.
- 6. There no longer is a cap or maximum divestment-penalty period. 42 [U.S.C.](#) § 1396p(c)(1)(E)(i).
- 7. Look-forward rule

If a community spouse gives away, including transfers by death, assets within five years after the institutionalized spouse first becomes eligible for benefits, that transfer can be counted against the institutionalized spouse. *See* Ops. Memos 13-38 (Nov. 7, 2013), 13-39 (Nov. 12, 2013). [Wis. Stat.](#) § 49.455(5)(d); *M.E. Handbook, supra* § [20.5](#), §§ 17.1, 17.2.7.7.

B. Specific Types of Transfers Qualifying as Divestments [§ 20.917]

- 1. Withdrawals from joint accounts to extent that person other than Medicaid applicant withdraws more than he or she deposited. 42 [U.S.C.](#) § 1396p(c)(3); *M.E. Handbook, supra* § [20.5](#), § 17.2.7.25.
- 2. If applicant or spouse authorizes another person to transfer, encumber, dispose, lease, consume, or otherwise act with respect to asset as though asset belonged to that person and person acts to cause asset to be unavailable for support or maintenance of individual *and* if applicant or spouse does not receive fair market value, then this is divestment when action is taken. [Wis. Stat.](#) § 49.453(7) ; *M.E. Handbook, supra* § [20.5](#), § 17.2.2.1.3.
- 3. Immediate annuity payments to the extent that purchase price exceeds expected value of benefit, which means amount that annuity will pay to annuitant during his or her expected lifetime; a medical condition that would shorten life expectancy diagnosed before the assets were transferred shortens payout time allowed, but only if the applicant informs DHS of such a medical condition. [Wis. Stat.](#) § 49.453(4); *M.E. Handbook, supra* § [20.5](#), § 17.2.6.17.
 - a. Under [Wis. Stat.](#) § 49.453(4)(a), there are additional requirements for annuities, promissory notes, or similar instruments to avoid divestment; instruments established after October 29, 1999, must provide for periodic payments back to transferor that meet one of the following requirements when transfer is made:
 - (1) Interest at applicable federal rate under I.R.C. § 1274(d).
 - (2) For an annuity with a guaranteed life payment, appropriate average of applicable federal rates based on expected length of annuity minus 1.5%.
 - b. Payments must be equal periodic payments unless interest payments are tied to interest rate and inequality of payments results from fluctuations in that rate. [Wis. Stat.](#) § 49.453(4)(a)2., (e)2.

NOTE: 2007 Wis. Act 20 made clear that the annuity must be irrevocable and nonassignable, the annuity must be actuarially sound as determined by SSA, and there can be no deferral or balloon payments.

- c. Required interest rates stated above do not apply if annuity is variable annuity tied to a mutual fund that is registered with SEC. [Wis. Stat.](#) § 49.453(4)(am).
- d. DHS is required to, but has not, promulgated rules to specify method to calculate expected value of benefit based on Treas. Reg. §§ 1.72-1–1.72-18 and specify adjustments to expected value of benefit based on medical condition diagnosed by physician before transfer. [Wis. Stat.](#) § 49.453(4)(c).
- e. In calculating amount of divestment, payments made to transferor in any year after year in which transfer was made will be discounted to year in which transfer was made by applicable federal rate specified in I.R.C. § 1274(d) on date of transfer. [Wis. Stat.](#) § 49.453(4)(c).
- f. For annuities purchased after February 29, 2004, even annuities in pay status will be treated as available assets unless they cannot be surrendered. Ops. Memo 04-03 (Feb. 12, 2004) (eff. Mar. 1, 2004).

NOTE: If an annuity contract by its terms prohibits its sale, then there is no company or individual who will buy it and, by definition, it will be unavailable; the purchase of an annuity contract that is an unavailable asset by its terms is not a divestment if the MA recipient or his or her spouse receives fair market value. DHA Case Nos. MED-23/65344, MDV-40/63375 (Wis. Div. Hearings & Appeals Sept. 7, 2004) (DHFS).

- g. Under [Wis. Stat.](#) § 49.47(4)(cr)1., 3.; *M.E. Handbook, supra* § [20.5](#), § 17.2.6.17, for annuities purchased on or after January 1, 2009, or for which there is a transaction that includes an addition of principal, elective withdrawals, changes to distributions, elections to annuitize the contract, changes in ownership, or other nonroutine action, it is a divestment unless one of the following is true:
 - (1) The state (specifically, the Wisconsin DHS Estate Recovery Program) is designated as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual.
 - (2) The state is named as a beneficiary in the second position after the community spouse or a minor or disabled child, or the state is named in the first position if the community spouse or a representative of the minor or disabled child disposes of any remainder for less than fair market value.
- h. Under [Wis. Stat.](#) § 49.453(4)(e)2.; *M.E. Handbook, supra* § [20.5](#), § 17.2.6.17, exceptions apply to divestment if
 - (1) The annuity is an annuity described in I.R.C. § 408(b) or (q);
 - (2) The annuity is purchased from a life insurance company or other commercial company that sells annuities as part of its normal course of business; or
 - (3) The annuity is purchased with proceeds from any of the following:
 - (a) An account or trust described in I.R.C. § 408(a), (c), or (p).

- (b) A simplified employee pension, within the meaning of section 408(k) of the Internal Revenue Code of 1986.
 - (c) A Roth IRA described in I.R.C. § 408A.
- 4. Notes, loans, and mortgages may be considered divestments. [Wis. Stat.](#) § 49.453(4c); *M.E. Handbook*, *supra* § [20.5](#), § 17.2.6.18.
 - a. The purchase of a promissory note, loan, or mortgage on or after January 1, 2009, is a divestment unless such note, loan, or mortgage meets all the following criteria:
 - (1) The instrument has a repayment term that is actuarially sound (paid out in the individual's life expectancy).
 - (2) The instrument provides payments in equal amounts during the term of the loan with no balloon or deferral payments.
 - (3) The instrument prohibits cancellation of the balance on the death of the lender.
- 5. Payments to relatives for personal-care services under some circumstances. [Wis. Stat.](#) § 49.453(5); *M.E. Handbook*, *supra* § [20.5](#), § 17.2.6.13.
- 6. Transfers of nonexempt property, including income, for less than fair market value in same month as transferor received property and action that causes income or assets not to be received, such as irrevocably waiving pension income, disclaiming inheritance, not accepting or accessing personal injury settlements or diverting the same to trust or similar devices, refusing to take legal action to obtain court-ordered payment, or refusing to claim required portion of deceased spouse's or parent's estate. *Tannler v. Department of Health & Soc. Servs.*, 206 Wis. 2d 386 (Ct. App. 1996), *aff'd*, 211 Wis. 2d 179 (1997); *M.E. Handbook*, *supra* § [20.5](#), §§ 17.2.7.2, 17.2.7.3, 17.2.7.4.
- 7. Under current divestment rules, *see* [Wis. Stat.](#) § 49.453(8)(b); *M.E. Handbook*, *supra* § [20.5](#), § 17.2.6.10, the DHS hardship-waiver process provides for the following:
 - a. A divestment penalty period must be waived when the imposition of the penalty period would deprive the individual of medical care to the extent that the individual's health or life would be endangered or would deprive the individual of food, clothing, shelter, or other necessities of life.
 - b. Upon receipt of a divestment penalty and hardship notice, the individual or individual's representative may file a request for a hardship waiver with the local agency.
 - c. For a waiver to be granted as of the initial date of the penalty period, the request for undue hardship must be received by the local agency within 20 days after notification of the divestment penalty is mailed. For untimely requests, the waiver effective date will not be earlier than the date the agency receives the request.
 - d. A facility in which an institutionalized individual who has transferred assets resides is permitted to file an application for undue hardship on behalf of the individual with the written permission of the individual or the individual's authorized representative.

- e. DHS may, during the pendency of an undue-hardship determination, pay the full rate under [Wis. Stat.](#) § 49.45(6m) for nursing-facility services for up to 30 days for the individual who transferred assets, to hold a bed in the facility in which the individual resides.

C. Transfers That Do Not Bar Eligibility for Individuals [§ 20.918]

1. Under *M.E. Handbook, supra* § [20.5](#), § 17.2.6.11, eligibility is not barred by transfer of homestead to any of the following:
 - a. Institutionalized person's spouse. [Wis. Admin. Code](#) § DHS 103.065(4)(b)1.
 - b. Institutionalized person's child under age 21. [Wis. Admin. Code](#) § DHS 103.065(4)(b)2.
 - c. Institutionalized person's child who is blind or permanently and totally disabled.
 - d. Institutionalized person's child who had resided in institutionalized person's home for at least two years before person's institutionalization, when child was "providing care" to person, enabling him or her to reside in own home and thereby avoid institutionalization in skilled-nursing facility or intermediate-care facility. [Wis. Admin. Code](#) § DHS 103.065(4)(b)4.
 - e. Institutionalized person's sibling who has a verified equity or ownership interest in institutionalized person's home and who had resided in home for at least one year before person's institutionalization (DHS considers *equity interest* to mean ownership interest in home by one or more persons who pay or have paid all or portion of mortgage or land-contract payments for home). [Wis. Admin. Code](#) § DHS 103.065(4)(b)3.
2. Under *M.E. Handbook, supra* § [20.5](#), § 17.2.6.12, transfer of nonhomestead property is not divestment if made by institutionalized person or spouse to
 - a. A spouse. [Wis. Admin. Code](#) § DHS 103.065(4)(cm)1.
 - b. Institutionalized person's or spouse's child of any age who is blind or disabled. [Wis. Admin. Code](#) § DHS 103.065(4)(cm)2.
3. Transfers are not barriers to eligibility in any of the following circumstances:
 - a. Transfer was made when resources were divided as part of divorce or separation action, lost because of foreclosure, or repossessed because of failure to meet payments. [Wis. Admin. Code](#) § DHS 103.065(4)(d)1.; *M.E. Handbook, supra* § [20.5](#), §§ 17.2.6.7, 17.2.6.8, 17.2.6.9.
 - b. Transfer was made with intent of receiving full market value or for other valuable consideration. [Wis. Admin. Code](#) § DHS 103.065(4)(d)2.a.; *M.E. Handbook, supra* § [20.5](#), § 17.2.6.9.
 - c. Transfer was made exclusively for purpose other than to qualify for Medicaid in institution (*see supra* § [20.20](#), para. 7.d.). [Wis. Admin. Code](#) § DHS 103.065(4)(d)2.b.; *M.E. Handbook, supra* § [20.5](#), § 17.2.5.

- d. Ownership of divested property was returned to individual (the full asset must be returned; partial cures are no longer permitted). [Wis. Stat.](#) § 49.453(8)(a)1.; [Wis. Admin. Code](#) § DHS 103.065(4)(d)2.c.; *M.E. Handbook, supra* § [20.5](#), § 17.2.3.
 - e. State determined that denial would work *undue hardship* on institutionalized person, defined as serious impairment to immediate health status. [Wis. Admin. Code](#) § DHS 103.065(4)(d)2.d.; *M.E. Handbook, supra* § [20.5](#), § 17.2.6.10.
4. A transfer of income or assets is not divestment if the individual can demonstrate that the transfer was not made with intent to become eligible for Medicaid. The individual must present the specific reason for the transfer and establish that the transfer was for a purpose other than to qualify for Medicaid.

The following circumstances are sufficient to establish that the resource was transferred without intent to qualify for Medicaid:

- a. The applicant had made arrangements to provide for his or her long-term care needs by having sufficient financial resources or long-term care insurance to pay for long-term care services for at least a five-year period at the time of the transfer. *M.E. Handbook, supra* § [20.5](#), § 17.2.6.1.
 - b. Taking into consideration the individual's health and age at the time of the transfer, there was no expectation of long-term care services being needed for the next five years. Examples include life expectancy of less than five years with sufficient resources kept to pay for care during life expectancy and unexpected need. *M.E. Handbook, supra* § [20.5](#), §§ 17.2.6.2, 17.2.6.3
 - c. If an individual had a pattern of charitable gifting, or gifting to family members (e.g., birthdays, graduations, weddings, etc.) before the look-back period, similar transfers during the look-back period are not considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15% of the individual's or couple's annual gross income. This exception is not limited to gifts made on traditional gift-giving occasions and does not preclude a pattern of giving to assist family members with educational or vocational goals. *M.E. Handbook, supra* § [20.5](#), §§ 17.2.6.4.
 - d. Resources spent on the current support of dependent relatives living with the individual or the individual's spouse are not considered to be divestments. The individual or the individual's spouse must either claim the relative as a dependent for IRS tax purposes or otherwise provide more than 50% of the cost of care and support for the dependent relative. *M.E. Handbook, supra* § [20.5](#), § 17.2.6.5.
5. Courts cannot approve property-division stipulations assigning substantially all of spouses' property to one spouse if court finds that one spouse is in process of applying for Medicaid or court determines that application might reasonably be expected to be made within 30 months after stipulation. [Wis. Stat.](#) § 767.34(2)(b).

D. Spousal Divestments Barring Eligibility for Both Spouses [§ 20.919]

If community spouse makes a divestment that causes ineligibility for institutionalized spouse, and community spouse later applies for institutional Medicaid for himself or herself, state must apportion

period of ineligibility between spouses. [Wis. Stat.](#) § 49.453(3)(c); 42 [U.S.C.](#) § 1396p(c)(4); *M.E. Handbook*, *supra* § [20.5](#), § 17.2.2.1.5.

NOTE: The transfer by the community spouse, *after* eligibility is determined, of the homestead, the CSRA (referred to in *M.E. Handbook* as *community spouse asset share*), and any assets not part of the CSRA that were *not* received from the institutionalized spouse is divestment if the transfer was made within five years after eligibility. *See supra* § [20.19](#), para. A.6.; [Wis. Stat.](#) § 49.455(5)(d), (6); *M.E. Handbook*, *supra* § [20.5](#), § 17.2.7.7.

E. Transfers by Noninstitutionalized Individuals [§ 20.920]

1. Divestment provisions apply for long-term care services received in the community and related medical care and pharmaceuticals. 42 [U.S.C.](#) § 1396p(c)(1)(A); [Wis. Stat.](#) § 49.453(2)(b).
2. Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 206, 113 Stat. 1822, 1834–37, created penalty for SSI eligibility for transfers of resources for less than fair market value beginning on December 14, 1999. 42 [U.S.C.](#) § 1382b(c).
3. Wisconsin grants automatic Medicaid eligibility to all SSI recipients.
4. An applicant denied SSI for disposal of resources may still be able to qualify for noninstitutional Medicaid (card services) as a medically needy person in Wisconsin.