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EMPLOYMENT LAW: WHAT EMPLOYERS NEED TO KNOW

Brown County Home Builders Association

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Presented by Attorney Jenna E. Rousseau

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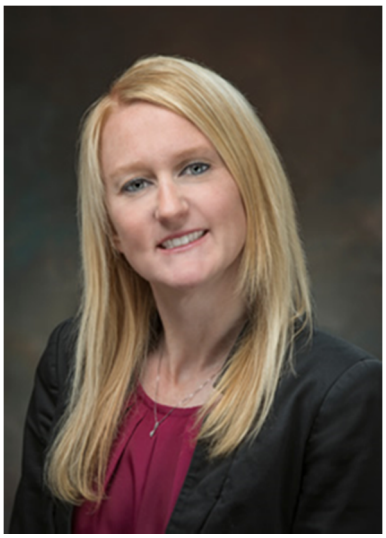

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Practice Areas

- Labor and Employment
- Real Estate
- Municipal Law
- Litigation

Education

- B.A., Marquette University, Cum Laude
- J.D., Marquette University, Magna Cum Laude

Jenna regularly advises clients on a variety of legal matters, including in such areas as Labor and Employment Law, Real Estate, Contracts, Civil Litigation, and School/Municipal Law.

In the area of Labor and Employment law, Jenna represents public and private employers in connection with discrimination/retaliation complaints, wrongful termination claims, wage and hour complaints, investigations, discipline and discharge, and employment contract disputes. She also assists employers with employee handbooks, personnel file matters, and general questions related to the application of state and federal employment and labor laws.

In addition, Jenna advises school districts and other local government clients on a wide range of matters, including public records and open meetings, drafting and negotiation of contracts,

application of state and federal laws, real estate/property issues, student matters, board governance, policy review, and other matters.

Jenna also has significant experience in the area of Civil Litigation, including representing public and private sector clients with employment-related matters, contract disputes, real estate/property disputes, construction disputes, and other matters. She has represented public and private sector entities at the administrative level, trial court level and appellate court level, in both state and federal court. Jenna also regularly counsels clients on the litigation process, and assists clients with resolving disputed issues without the need for litigation.

Professional Activities

- Member, State Bar of Wisconsin
- Member, Brown County Bar Association
- Member, Wisconsin School Attorneys Association
- Member, Wisconsin Defense Counsel
- Member, Green Bay Area Chapter of the Society for Human Resource Management
- Admitted to the United States District Court, Eastern District of Wisconsin
- Admitted to the United States District Court, Western District of Wisconsin
- Admitted to the United States Court of Appeals, Seventh Circuit
- Admitted to the United States Court of Appeals, District of Columbia Circuit

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Community Involvement

- Leadership Green Bay, Green Bay Area Chamber of Commerce (Class of 2013)
- Member, Current Young Professionals Group, Green Bay Area Chamber of Commerce
- Associate Member, Brown County Home Builders Association
- Member, Government Affairs Committee, Brown County Home Builders Association
- Board Member, Oconto Area Humane Society
- Member, Oconto Area Chamber of Commerce

Recognitions

- Named “Wisconsin Rising Star” by Super Lawyers Magazine (2013-2014; 2017-2019)

I. LAWS

A. Federal.

1. Fair Labor Standards Act of 1938 (FLSA).

a. 29 U.S.C. § 201, *et seq*.

b. 29 CFR Chapter V.

B. Wisconsin

1. Wis. Stats. Chapter 103 ("Employment Regulations").

2. Wis. Stats. Chapter 104 ("Minimum Wage Law").

3. Wis. Stats. Chapter 109 ("Wage Payments, Claims and Collections").

4. Wis. Admin. Code DWD 270 – 279 ("Labor Standards").

II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA)

A. Overview.

1. The FLSA governs minimum wage, overtime pay, recordkeeping requirements, and child labor in the public and private sectors.

2. The FLSA requires non-exempt employees be paid at least $7.25/hour. 29 U.S.C. § 206.

3. The FLSA requires non-exempt employees working in excess of forty hours in a workweek be paid at least 1.5 times the employees' regular hourly rate for every hour worked past forty. 29 U.S.C. § 207.

B. Considerations for employers.

1. Classifying employees.

a. Classification of employees determines the extent to which minimum wage, overtime, and recordkeeping requirements apply.

b. Employees may be exempt, non-exempt, or not covered by FLSA.

2. Risk of failure to comply with FLSA.

a. Misclassification and underpayment can result in an employer being required to pay the difference between what the employee was paid and the amount the employee should have been paid. An employee may also seek additional damages, as well as attorney's fees and court costs. 29 U.S.C. § 216).

3. Two categories of employees covered by FLSA:

   a. Exempt.

      i. Exempt employees are not subject to FLSA's minimum wage and overtime requirements.

      ii. Exempt employees are nonetheless subject to minimum wage requirements under state law. Wis. Stat. § 104.035.

   b. Non-exempt.

      i. Non-exempt employees are subject to FLSA's minimum wage and overtime requirements.

III. METHOD USED TO CLASSIFY EMPLOYEES

A. Generally, employees may be classified as exempt if they satisfy three separate requirements:

1. Salary basis requirement. 29 CFR § 541.602.

   a. An employee is paid on a salary basis when he or she receives a regular, predetermined amount of compensation, and the compensation must not be subject to reduction because of variations in the quality or quantity of work performed.

2. Minimum salary requirement. 29 CFR § 541.604.

   a. An employee must be paid at least $684 per week or $35,568 per year to satisfy the minimum salary test.

   b. Administrative and professional employees (as described below) may be paid on a fee basis rather than a salary basis and still be classified as exempt. An employee will be considered to be paid on a fee basis if the employee is paid an agreed sum for a job regardless of the time required to complete the job. 29 CFR § 541.605.

   c. An employer can count discretionary bonuses towards an employee's compensation calculation under a new FLSA rule. In the past, the U.S. Department of Labor (DOL) excluded discretionary bonuses from an employee's compensation for the purposes of the minimum salary level. A revised rule allows 10% of an employee's salary as a discretionary bonus, while the remaining 90% must be paid on a salary basis. Therefore, to maintain an employee's exempt status, employers cannot rely on discretionary bonuses totaling more than 10% of the minimum salary level.

   d. The new FLSA rule also allows for a "catch-up" payment to satisfy the minimum salary test. If an employee's compensation falls short

of the minimum salary level for a given year, the employer may make a one-time payment to the employee to raise the employee's yearly salary above the threshold requirement. The payment only counts towards the previous year's salary, and the one-time payment cannot exceed 10% of the minimum salary level ($3,536.80). These "catch-up" payments must be made within one pay period of the end of the preceding 52-week period. If a "catch-up" payment is not made, the employee is entitled to overtime pay for any overtime hours worked during the previous 52-week period.

3. The third element of the FLSA exempt employee test requires performing exempt work as the employee's primary duty. 29 CFR § 541.700.

   a. "Primary duty" refers to the principal, main, major, or most important duty that the employee performs. Relevant factors include the relative importance of the employee's exempt duties compared to the employee's other duties; the amount of time the employee spends performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and wages paid to other employees for performing the kinds of non-exempt work that the employee performs.

   b. Employees who spend more than half of their time performing exempt work will generally satisfy the "primary duty" requirement. Time spent performing exempt work is not the sole test; employees who spend less than half of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors weigh in support of such a determination.

   c. Example: assistant managers in retail performing exempt executive work such as supervising/directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if they spend more than half of their time performing non-exempt work such as working at the cash register. However, if these employees are closely supervised and earn little more than the non-exempt employees, they likely would not meet the "primary duty" requirement.

   d. Exempt employees will thus include those who meet the salary basis test, the minimum salary test, and perform a primary duty of exempt work consistent with one of the following exemptions:

      i. Executive exemption. 29 CFR § 541.100.

         (A) The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

(1) "Management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 CFR § 541.102.

(B) The employee must customarily and regularly direct the work of at least two (2) or more other full-time employees or their equivalent; and

(C) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

(1) To determine whether an employee's suggestions and recommendations are given "particular weight," relevant factors include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to

employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

29 CFR § 541.105.

ii. Administrative exemption. 29 CFR § 541.200.

(A) The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

(1) The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by

employees who also would qualify for another exemption.

29 CFR § 541.201.

(B) The employee's primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.

(1) Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 CFR § 541.202.

iii. Professional exemption. 29 CFR § 541.300.

(A) The employee's primary duty must include the performance of work requiring knowledge of an advanced type in a field of science or learning

customarily acquired by a prolonged course of specialized intellectual instruction.

(1) The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(2) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(3) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.

29 CFR § 541.301.

(B) In addition, this provision exempts employees from FLSA coverage if the employee's primary duty includes the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

iv. Computer employee exemption. 29 CFR § 541.400.

(A) The employee must be compensated either on a salary or fee basis at a rate not less than $684 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

(B) The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the above-mentioned duties, the performance of which requires the same level of skills.

v. Highly compensated employee exemption. 29 CFR § 541.601.

(A) The employee must have a total annual compensation of at least $100,000; and

(B) The employee must customarily and regularly perform any one or more of the exempt duties for executive, administrative, or professional employees.

IV. ADDITIONAL WAGE AND HOUR CONSIDERATIONS FOR EMPLOYERS

A. Dual Employment.

1. If an employee works in two or more positions, at different hourly rates, for the same employer, then that employer must calculate overtime based on the weighted average of the hourly rates paid to the employee. 29 CFR § 778.115.

2. Alternatively, an employer and an employee may agree that a particular regularly hourly rate will be used for purposes of calculating overtime. 29 CFR § 778.419.

3. Employers must use caution when dealing with an individual whose dual employment includes employment in an exempt position and a non-exempt position.

B. Determining hours worked under FLSA.

1. A workweek is a period of 168 hours during seven consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of minimum wage and overtime payment, each workweek stands alone; there can be no averaging of two or more workweeks. Employee coverage, compliance with wage payment requirements, and the application of most exemptions are determined on a workweek basis.

   Non-exempt employees must be paid for all hours worked in a workweek. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal work activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work.

1. The following scenarios frequently cause confusion in determining hours worked:

   a. Waiting time. 29 CFR §§ 785.14 and 785.15.

      i. The facts may show that an employee was engaged to wait (which counts as work time) or the facts may show that an employee was waiting to be engaged (which does not count as work time). A stenographer who reads a book while waiting for dictation is working, because he or she has been "engaged to wait."

   b. On-call time. 29 CFR § 785.17.

      i. An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he or she can be

reached, is generally not working while on call. If there are additional constraints on the employee's freedom, then the time might need to be counted as work time.

c. Rest and meal periods. 29 CFR §§ 785.18 and 785.19.

i. Rest periods of short duration (roughly twenty minutes or less) are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time; however, the employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he or she is required to perform any duties while eating. If the employee is not completely relieved of duties during the meal period, then that time is compensable.

d. Lectures, meetings, and training programs. 29 CFR § 785.27.

i. Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if four criteria are met: it is outside normal hours, it is voluntary, it is not job related, and no other work is performed concurrently.

e. Travel time. 29 CFR §§ 785.35 – 785.41.

i. Travel from "home to work" at the beginning of the day and "work to home" at the end of the day does not count toward hours worked. 29 CFR § 785.35.

ii. Time spent traveling from job site to job site during the workday does count toward hours worked. 29 CFR § 785.38.

f. Preparatory Time. 29 CFR § 785.24.

i. "Preliminary" or "postliminary" activities that are not closely related to the "principal activity" of an employee's work are not compensable. However, activities closely

related to the employee's principal work activities are compensable.

ii. Examples: If an employee in a chemical plant cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.

g. Training. 29 CFR § 785.29.

Training directly related to the employee's job designed to make the employee handle his job more effectively, as distinguished from training him for another job, or to a new or additional skill, is compensable time. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

2. Monitoring "off-the-clock" time. 29 CFR § 785.11.

a. When an employee works beyond his or her normal shift, that time counts as hours worked and employers will be liable for this time if they know or have reason to believe that this work is being performed. This may include:

i. Employees accessing/responding to e-mail outside of normal work hours.

ii. Employees working immediately prior to or after a scheduled shift.

iii. Employees working over an employee's lunch period.

b. Note that non-exempt employees cannot agree to "opt out" of overtime pay for any overtime work; even if the employee intends to work "extra" on a voluntary basis, this time must be counted.

c. Tip: establish written guidelines to prevent "off-the-clock" work, and enforce the guidelines.

C. Retaliation.

Employees who have filed complaints or provided information regarding FLSA violations cannot be discriminated against or discharged on account of such activity. If adverse action is taken against an employee for engaging in protected activity, the affected employee or the Secretary of Labor may file suit for relief, including reinstatement to his/her job, payment of lost wages, and damages.

D. Penalties.

The Department of Labor uses a variety of remedies to enforce compliance with the FLSA requirements. When Wage and Hour Division investigators encounter violations, they recommend changes in employment practices to bring the employer into compliance, and they request the payment of any back wages due to employees.

Willful violators may be prosecuted criminally and fined up to $10,000. A second conviction may result in imprisonment. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil money penalties for each violation.

Employees have a private right of action to collect back pay, compensatory damages, and punitive damages.

VI. ADDITIONAL STATE LAW CONSIDERATIONS

A. Deductions for faulty workmanship, loss, theft or damage. Wis. Stat. § 103.455.

1. Employers may not deduct wages from an employee, who is not an independent contractor, for defective or faulty workmanship, lost or stolen property, or damage to property. Employers may make such deductions if the employee authorizes the employer in writing to make that deduction, the employer and a representative designated by the employee determine that the defective or faulty workmanship, loss, theft or damage is due to the employee's negligence, carelessness, or willful and intentional conduct, or the employee is found guilty or held liable in court due to his or her negligence, carelessness, or willful and intentional conduct.

2. In a civil action brought by an employee, employers may be liable for improper deductions up to twice the amount of the improper deduction taken.

B. Listing deductions from wages. Wis. Stat. § 103.457.

1. An employer shall state clearly on the employee's pay check, pay envelope, or paper accompanying the wage payment the amount of and reason for each deduction from the wages due or earned by the employee, except for miscellaneous deductions authorized by request of the individual employee for reasons personal to the employee.

2. A reasonable coding system may be used by the employer.

C. When wages payable; pay orders. Wis. Stat. § 109.03.

1. Required frequency of payments.

a. Every employer shall as often as monthly pay to every employee engaged in the employer's business, except those employees engaged in logging operations and farm labor, all wages earned by the employee to a day not more than thirty-one (31) days prior to the date of payment. Any employee who is absent at the time fixed for payment or who for any other reason is not paid at that time shall be paid thereafter at any time upon six (6) days' demand. This required frequency of wage payments does not apply to the following:

2. Payment to discharged or resigned employees.

a. Any employee, except a sales agent employed on a commission basis, not having a written contract for a definite period, who quits employment or who is discharged from employment shall be paid in full by no later than the date on which the employee regularly would have been paid under the employer's established payroll schedule or by the date of payment required in subsection 1 above, whichever is earlier.

3. Payment upon death of employee.

a. In case of the death of an employee to whom wages are due, the full amount of the wages due shall upon demand be paid by the employer to the spouse, domestic partner, children, or other dependent living with the employee at the time of death.

b. An employer may, not less than 5 days after the death of an employee and before the filing of a petition or application for administration of the decedent's estate, make payments of the wage due the deceased employee to the spouse, domestic partner, children, parents, or siblings of the decedent, giving preference in the order listed.

c. If none of the persons listed in paragraph (b) above survives, the employer may apply the payment of the wage or so much of the wage as may be necessary to paying creditors of the decedent in the order of preference prescribed in Wis. Stat. § 859.25 for satisfaction of debts by personal representatives.

d. The making of payment in the manner described in this subsection shall discharge and release the employer to the amount of the payment.

D. Wage claims, collection. Wis. Stat. § 109.09.

1. The Department of Workforce Development investigates wage claims, reviewing wages claimed to be due from an employer in the 2 years preceding the date on which a claim is filed by an employee.

2. The Department may sue the employer on behalf of the employee to collect any wage claim or wage deficiency, in addition to other penalties the employer may be required to pay.

3. Employers may not discharge or otherwise discriminate against employees in connection with any proceeding brought by an employee under Wis. Stat. Ch. 109.

VII. EMPLOYEES AND INDEPENDENT CONTRACTORS

A. Federal Law.

1. Federal courts use the following factors to determine if someone is an employee or an independent contractor.

a. The nature and degree of the alleged employer's control as to the manner in which the work is to be performed;

Factors could include the amount of supervision the employer has over the person or the ability to set hours.

b. The alleged employee's opportunity for profit or loss depending upon his managerial skill;

This factor evaluates the risk the worker face for a monetary loss in how they perform the work.

c. The alleged employee's investment in equipment or materials required for his task, or his employment of workers;

This factor analyzes the investment the worker puts into the work. If the person provides their own tools, equipment, or has their own facilities, it weighs in favor of independent contractor status.

d. Whether the service rendered requires a special skill;

The more specialized the worker's skillset, the more likely a court will find this factor weighs in favor of independent contractor status.

e. The degree of permanency and duration of the working relationship;

This factor evaluates how the long the parties have had a relationship for and the permanency of that relationship.

f. The extent to which the service rendered is an integral part of the alleged employer's business.

If the workers provide services that are essential to the business, that weighs in favor of employee status.

g. The worker's dependence on the employer.

This factor looks at whether the worker relies heavily upon the employer. If the employer is their only "client" that weighs in favor of employee status.

Of the above factors, the first one is the most important. Courts will look at the amount of independence the person has in performing the work.

B. Wisconsin Law.

1. Independent Contractors under Wisconsin's Wage Payment Laws[1]

The Labor Standards Bureau utilizes a six-part test to determine whether the worker in question is economically dependent on the employer.[2] These factors mirror the federal law factors. These six parts include:

a. The degree of control over the worker exercised by the employer.

b. The worker's opportunity for profit or loss is based upon his or her managerial skills.

c. The worker has invested in equipment or employed others to assist in performing the work.

d. A specialized skill is required to complete the work.

e. The degree of permanence of the relationship between the parties.

f. Do the services provided by the worker constitute an integral part of the employer's business?

The first factor, degree of control, is regarded as the most important of the factors listed above. The Bureau of Labor Standards has outlined the following questions to aid in the determination of an employer's degree of control over the worker:

[1] Different tests and standards apply depending on the law at issue, such as the Wisconsin Fair Employment Act, Wisconsin's Unemployment Compensation Law, or Wisconsin's Worker's Compensation Law.

[2] *Labor Standards – Worker Classification*, Wisconsin Department of Workforce Development (available at https://dwd.wisconsin.gov/worker_classification/er/laborstandards/employers.htm).

a. Who controls the means and methods of work? Is it the employer or the worker?

b. Does the worker perform his or her services without supervision?

c. Who establishes the routine or schedule? Is it the employer or the worker?

d. Does the employer require the worker to file oral or written reports?

e. Does the employer require the worker to attend meetings?

f. Who determines the hours of work? Is it the employer or the worker?

g. Does the worker hold his or her services out to the general public?

h. Does the worker possess the required permits, licenses and certificates?

i. Is the worker doing business as a corporation or under a business name?

j. What is the method of payment? Is it by time or by job?

k. Are taxes deducted or withheld from the worker's paychecks?

l. Does the worker receive fringe benefits or bonuses?

This is not an exclusive list and no single factor is determinative, the relationship must be viewed as a whole.

VIII. RECORDKEEPING REQUIREMENTS

A. Federal requirements 29 CFR Part 516.

1. Records pertaining to non-exempt employees. 29 CFR § 516.2.

a. Required items:

i. Full name.

ii. Home address.

iii. Date of birth (if under 19).

iv. Sex and occupation in which employed.

v. Time of day and day of week on which the employee's workweek begins.

vi. Regular hourly rate of pay for any workweek in which overtime compensation is due; explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis; and the amount and nature of each payment which, pursuant to the FLSA, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data).

vii. Hours worked each workday and total hours worked each workweek.

viii. Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation.

ix. Total premium pay for overtime hours.

x. Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions.

xi. Total wages paid each pay period.

xii. Date of payment and the pay period covered by payment.

b. Additional records to be kept 29 CFR §§ 516.2(b) and 516.2(c):

i. Records relating to retroactive payment of wages.

ii. Records relating to employees working on fixed schedules.

2. Records pertaining to exempt employees. 29 CFR § 516.3.

a. Required items:

i. Full name.

ii. Home address.

iii. Date of birth (if under 19).

iv. Sex and occupation in which employed.

v. Time of day and day of week on which the employee's workweek begins.

vi. Total wages paid each pay period.

vii. Date of payment and the pay period covered by payment.

viii. Basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.

3. Length of time to preserve records. 29 CFR §§ 516.5 and 516.6.

a. Employers shall preserve payroll records, collective bargaining agreements, and sales and purchase records for at least three years. Records on which wage computations are based should be retained for two years (i.e., time cards, wage rate tables, work and time schedules, and records of additions to or deductions from wages).

B. Wisconsin Recordkeeping Requirements

1. Each employer shall keep permanent records for at least 3 years, available for inspection and transcription by a duly authorized deputy of the Department of Workforce Development, showing the name and address of each employee, the hours of employment and wages of each and such other records as the department may require. Wis. Admin. Code DWD § 274.06.

2. Every employer shall make and keep for at least 3 years payroll or other records for each of their employees which contain:

a. Name and address.

b. Date of birth.

c. Date of entering and leaving employment.

d. Time of beginning and ending of work each day.

e. Time of beginning and ending of meal periods:

(1) When employee's meal periods are required or when such meal periods are to be deducted from work time.

(2) This requirement shall not apply when work is of such a nature that production or business activity ceases on a regularly scheduled basis.

f. Total number of hours worked per day and per week.

g. Rate of pay and wages paid each payroll period.

h. The amount of and reason for each deduction from the wages earned.

i. Output of employee, if paid on other than time basis.

The required records or a duplicate copy thereof shall be kept safe and accessible at the place of employment or business at which the employee is employed, or at one or more established central record keeping offices in the state of Wisconsin.

The required records shall be made available for inspection and transcription by a duly authorized deputy of the department during the business hours generally observed by the office at which they are kept or in the community generally.

Wis. Admin. Code DWD § 272.11.