THE GUIDING LIGHT: Identify if there is a potential employment law claim, identify the time limit, and make the appropriate referral.

I. GENERAL GUIDELINES FOR INITIAL INTERVIEWS

A. Determine and advise on the statute of limitations:
   --very short for grievances (3-5 days?)
   --very short for WC to inform employer of the fact of injury, but not for filing an administrative complaint;
   --UC APPEALS
   
   14 days to request hearing from date of Initial Determination can be mailed or faxed [back side of Initial Determination].
   
   21 days to appeal a hearing decision to LIRC
   
   30 days to commence judicial review of LIRC decision; **BUT (malpractice prevention tip #1)** filing and service must be accomplished within 30 days of date of decision (not receipt; and the "3 days because of service by mail" rule does not apply to judicial review time limit).
   
   --30 days for State Family Medical Leave Act. [2-3 years for federal]
   
   --6 months days for NLRB, DFR for issues related to unions. [1 year for state employers/WERC]
   
   --300 days (maybe, but assume 240 days) for filing Fair Employment (discrimination) charges.

B. Claim filing and referrals

   – UC claim filing on-line: https://ucclaim-wi.org/InternetInitialClaims/InfoBasicRequirements.asp. Or by phone 1-800-UCCLAIM
   
   – Grievances – union representative

   – State FMLA: on-line form for mailing: http://dwd.wisconsin.gov/dwd/forms/erd/erd_8994_e.htm

C. **MALPRACTICE PREVENTION TIP #2: KEEP FILING THE UC CLAIMS, KEEP FILING THE UC CLAIMS, KEEP FILING THE UC**
CLAIMS

II. EMPLOYMENT LAW OVERVIEW

A. Basic Principle -- employment at will: Discharge for any reason or no reasons at all. Quit for any reason or no reason at all. Same principle for promotion, transfer, pay, etc.

– no tort liability for employer's intentional lies inducing continued employment. McKenzie v. Miller Brewing, 2001 WI 23, 241 Wis.2d 700, 623 N.W.2d 739

– but promissory estoppel is recognized as a viable theory. McKenzie, ¶ 25; Bicknese v. Sutula, 2003 WI 31, 260 Wis. 2d 713, 660 N.W.2d [decided on different ground, but an example of a successful promissory estoppel claim in a job offer context]

B. Contract Exception to Employment At Will

1. Employment contract for a fixed term contract defines the grounds on which it can be terminated by either party. Same principle for promotion, transfer, pay, etc.

Restrictive covenants in employment contracts: must be reasonable in "activity, time, geography"

§103.456. See, Strieff v. American Family, 118 Wis. 2d 602, 348 N.W.2d 505 (1984);

See Star Direct Inc. v. Dal Pra, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898 (3 clauses: business, customer lists, confidentiality. Severability)


Check for disclaimer, particularly in the front of the handbook.

C. Union Contract Exception to Employment At Will

1. Standard clause: discharge only for "just cause."

2. Must use contract grievance mechanism to enforce contract. EXTREMELY DIFFICULT for an individual employee to sue employer to contract breach. Hybrid §301/DFR -- must establish that union breach its Duty of Fair Representation. Usually only grounds are race and union politics
3. Sometimes very short time limits for filing grievances: Advise clients to read the Collective Bargaining Agreement and to contact union within time limit.

4. Protection for and from the Union

   National Labor Relations Board for most private employers
   Wisconsin Employment Relations Commission for public employers
   Time limit: 6 months federal/ 1 year WERC

D. Discrimination Exception to Employment At Will

1. Bases (state and federal): sex, race, national origin, age, handicap, religion, military service (including reserve/national guard)

   §111.32

   Bases, state law only: marital status, sexual orientation, arrest record, conviction record, use or non-use of lawful products off-duty off-premises.

2. Theories of discrimination:

   Disparate treatment/disparate impact

   Sex: quid pro quo; hostile environment

   Disabilities: failure to accommodate reasonably

3. Enforcement

   State: Equal Rights Division (ERD) of Department of Workforce Development (DWD) [819 N. 6th Street; 2nd Floor]

   Federal: Equal Employment Opportunity Commission [Reuss Building]

   General Rule: 300 days for filing administrative charge.[240 days, maybe federal]

   Meet the deadline with months to spare, but the client generally does not need to filed immediately. VERY LONG PROCESS: 3-10 years.
E. Wrongful Discharge Public Policy Exception to Employment At Will

A discharge may be "wrongful" if it is because the employee (1) refused to obey (2) an order to violate (3) a fundamental public policy, (4) defined by state law (including Wis. Admin. Code)

See, e.g., Winklemann v. Beloit Memorial Hospital, 168 Wis. 2d 12, 483 N.W.2d 211 (1992).

F. Civil Service Exception to Employment At Will

Government employees may be protected both by collective bargaining agreement and civil service rules. Time limits vary.

Because the government's action, as an employer, is always "State action" for purposes of the 14th Amendment, constitutional limits may apply that would never apply in private sector employment decisions.

III. FAMILY MEDICAL LEAVE ACT, Wis. Stat. §103.10.

A. Coverage: 50 or more "permanent" employees during 6 of past 12 months; claimant must have 1,000 or more hours in past 12 months

B. Unpaid leaves allowed within a 12 month period:
   State law:
   - 6 weeks for newborn or adoption, if taken within the first 16 weeks after the birth or adoption;
   - 2 weeks for serious health problem of child, spouse, or parent
   - 2 weeks for own serious health problem.

   8 weeks maximum under state law. 12 weeks maximum under federal


   Federal law allows employers to compel substitution.

D. SHORT FILING LIMIT -- Equal Rights Division -- 30 days.

F. Federal FMLA: similar, but 12 weeks instead of 10. Longer SOL (2 yrs.) Some other differences.

   Side by side comparison: www.dwd.state.wi.us/er/family_and_medical_leave/publication_erd_9680_p.htm
IV.  WORKER COMPENSATION,  Chapter 102 -- Referral to private bar

A.  On-the-job injuries, covers all medical expenses related to the injury "weekly" payments, for either or both:
    TTD: temporary total disability.  and TPD temp.  partial
    PPD: permanent partial disability.
    discharge or failure to rehire because of injury or claim prohibited

B.  Enforcement

    Generally, benefits (and medical bills) are paid through employer's personnel office or its insurer.  If disputes: Worker Compensation Division of DILHR. Process is started with filing an application

C.  Time Limits

    The important time limit is notice to the employer of the fact of an injury. REPORT THE FACT OF INJURY ASAP.  The time periods for filing the application for benefits are very lenient if the injury is reported promptly.

D.  WC is the exclusive remedy for claims related to on the job injuries, including state law claims of handicapped discrimination.

    See Vorwald v. School Dist. of River Falls, 167 Wis. 2d 549, 482 N.W.2d 93 (1992)

    Cannot sue employer for anything else. Cannot sue co-worker. But, products liability action against manufacturer of equipment, etc. -- General personal injury 3 years statute of limitations.

V.  UC INTAKE IN 20 MINUTES OR LESS IN FIVE EASY STEPS

A.  WHAT IS UC: weekly check for people unemployed "through no fault of their own." Based on past employment; not based on need. Benefits depend on prior wages, not family size.

    Amount: Weekly benefit = 4% of highest quarter of wages in base period. $53 -- $355. ROUGH rule of thumb: \( \frac{1}{2} \) gross weekly wages.
    Partial UC benefits while working: $30 and \( \frac{1}{3} \) disregard of wages/week.

    Duration: 26 x Weekly rate or 40% of base period wages. FOLK LORE: 26 weeks. In 2010, multiple federal "extensions" – could be up to 92 weeks of UC

    Procedure: During week employment is lost, file initial claim by phone: 800-UC-CLAIM, or on-line

    The employer is contacted. If the employer objects (or there appears from
the claimant's information to be a disqualifying issue), a telephone interview is arranged with the claimant. Written Decision [Initial Determination] is mailed.

**REQUESTING A HEARING:** The loser has **14 days from the date of the Initial Determination to appeal** [request a hearing].

Mail: Room 382, 819 N. 6th Street, Milwaukee, WI 53203

**FAX 227-4264**

No magic words. Anything identifying the claimant (name and SSN) and the decision being appealed (date, employer, or decision id # on top line)

2-3 weeks to Notice of Hearing.

7-10 days Notice of Hearing.

Hearing is trial by ambush. No discovery other than looking at Hearing File at UC Hearing Office.

Hearing is informally formal: sworn testimony, subpoenas, order of bench trial with party with burden of proof going first; exhibits marked, identified, authenticated. Hearsay rule matters.

Written decision [Appeal Tribunal Decision] is issued approx. 10-14 days later. The loser can appeal to LIRC in 21 days of date of Hearing Decision..

LIRC review is a paper review, but is *de novo*. 3-6 months for a decision by LIRC. Benefits paid or not paid according to Appeal Tribunal Decision will LIRC appeal is pending.

LIRC decision subject to judicial review for 30 days. Judicial review very limited in scope.

**AFTER THE INITIAL CLAIM, WEEKLY CLAIMS MUST BE PHONED IN EVEN IF BENEFITS WERE DENIED.** Phoned in starting Sunday for the preceding 2 weeks. 438-5395

**B. ON INTAKE, STEP 1: DETERMINE THE STATUS -- GET A COPY OF:**

--the most recent decision;
--any statements from the client (including requests for hearings or appeal, but the most important one is the statement the client gave the UC office (client copy is green) at the interview before the Initial Determination;
--any documents the client brought in that seem sort of important (e.g., the discharge letter, warnings, doctor's return to work slip, work rules)

Best source for documents: UC Hearing file; Room 382, 819 N. 6th St.

C. STEP 2: DETERMINE WHAT'S AT STAKE -- FIND OUT THE WEEKLY BENEFIT RATE

Most clients know their weekly UC amount. If not, they have or can get from the UC office their "Benefit Computation," the one page sheet that lists the wages they earned in columns by calendar quarters.

D. STEP 3: GET THE CLIENT'S VERSION (TIME PERMITTING) OF WHAT SEEM TO BE THE IMPORTANT FACTS.

It is usually best to work from the client's UC statement. Although those statements contain lots of inaccuracies and omit most of the client's side, they give a pretty good inkling of the important factual allegations.

E. STEP 4: EVEN IF YOU DID NOT HAVE TIME FOR STEP 3: GIVE THE FOLLOWING ADVICE:

1. KEEP FILING THE WEEKLY CLAIMS KEEP, FILING THE WEEKLY CLAIMS, KEEP FILING THE WEEKLY CLAIMS!!!

2. WHEN IN DOUBT APPEAL -- all time limits are jurisdictional. Appeals can be withdrawn. No sanction for “frivolous” appeal.

3. Referrals:

Legal Action: Telephone: (414) 278-7714
Tuesdays 3:00 -- 4:30 p.m.
Thursdays 8:30 -- 10:00 a.m.

Marquette Law School UC Clinic: Mid January -- Mid April; Mid-September-Mid December.

F. STEP 5 (extra credit):

Analysis of likely issues and documents:
Separation from employment issues:

Is it a quit, a discharge, a layoff definite or indefinite), a leave (voluntary or involuntary)

What are the documents. Who said what when.

Significantly different consequences
Discharge for misconduct (7 weeks and until earn 14 times weekly benefit rate, AND lose all wage credits from discharging employer.

Quit requalification: subsequent work earning 4 times weekly benefit rate. Requalifying work can be in part-time employment AND can usually keep part-time employment and still claim UC.

Discharge for misconduct connected with employment

Theoretically more difficult standard and discharge for “good cause. “Willful and substantial disregard for employers interest”

Absenteeism and drug policy cases: the employer’s policies are especially important.

Voluntary termination from employment.

Good cause attributable to the employer (essentially a constructive discharge standard) or one of the exceptions in Wis. Stat. 108.04(7)

Quit by conduct: (why isn’t a no-show a “quit this job and shove it” employment at will quit.)