2015 WGFOA FALL CONFERENCE

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I. WAGE AND HOUR CASE LAW UPDATE

A. **Best Defense is Well-Maintained Records** – *Roberts v. Advocate Health Care*, 2015 WL 4719897 (N.D. Ill. Aug. 7, 2015)

1. In *Roberts*, the plaintiff nurse alleged that she worked for a hospital "8 to 12 hours of unpaid overtime each workweek." The hospital demonstrated that plaintiff was responsible for submitting her own timesheets and was paid for hundreds of hours of overtime work during the period in question.

2. Rejecting plaintiff's assertion that the supervisor with whom she would meet at the end of her shift should have known that she was off-the-clock when they met and further should have known that she did not correct her timesheets after those meetings to ensure that all work time was captured, the court observed that the supervisor had 40 to 50 subordinate employees and it was not reasonable to expect him to be aware of who was on the clock and when.

3. Rather, it was plaintiff's duty to report her work time. This case is somewhat of a departure from the maxim that the employer is solely responsible for maintaining records.

4. **Practice Pointer** → Best defense for employers confronted with claims of "off-the-clock" (i.e., unrecorded) work under the FLSA are accurate contemporaneous time records created by employees based on clearly communicated time keeping practices.

B. **Fluctuating Workweek** – *Speer v. Cerner Corp.*, 2015 WL 3541065 (W.D. Mo. June 3, 2015).

1. Fluctuating workweek method of calculating overtime payments – 29 C.F.R. § 778.114.

a. Salary is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek.

b. The regular rate of pay is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week.

c. Payment for overtime hours at one-half such rate, in addition to the salary, satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

d. EXAMPLE: Employee with a $1,000/week salary who works 50 hours is entitled to $1,000/50 = $20 * (0.5) = $10/hour for each of his ten overtime hours, or $100 in overtime premium pay.

e. The regulation does not address any degree to which hours must fluctuate.

2. *Speer* case reemphasizes that fluctuation above the 40 hours statutory threshold alone is sufficient.

3. In *Speer*, plaintiffs alleged that by applying the fluctuating workweek overtime concept to them, when their hours fluctuated only above 40 (and never dipped below), defendant violated the FLSA.

4. The court observed that "plaintiffs' contention that the fluctuating workweek method of calculating overtime obligations cannot be used when the work week is never less than 40 hours is legally unsound.

5. **Practice Pointer →** Implementation of the fluctuating workweek method must be carefully reviewed under federal and state law. Consult legal counsel to ensure strict compliance with the law.

C. **"Gap Time"** – *Campbell v. Cnty. of Monmouth*, 2015 WL 3626694 (D.N.J. June 10, 2015)

1. Historically, local governments have had CBAs which considered full-time employees to work 35 or 37½ hours per workweek. Hours in excess, but before 40 hours in a workweek, i.e., hours in the "gap," were often considered "overtime" and compensated at the premium overtime rate of 1½ times the employee's regular rate of pay (or even through comp time).

2. The FLSA generally governs *only* the payment of minimum wages and overtime. It does not govern unpaid wage claims that do not result in a minimum wage or overtime violation—e.g., a claim brought by an employee for premium overtime pay for hours worked in the gap.

3. The *Campbell* case rejects these so-called "gap time" claims.

4. Plaintiff Campbell was a registered nurse at a care center operated by the county. The parties did not dispute that plaintiff never worked overtime and that she never fell below the minimum wage. She nevertheless continued to pursue an FLSA claim based on the allegedly unpaid "gap time" she worked. The court granted judgment to defendant.

5. Note that employers are often required to defend cases that still challenge basic, well-recognized principles under the FLSA.

6. **Practice Pointer** → As long as the total wages paid by the employer equal or exceed the minimum wage for all hours worked, there is no minimum wage FLSA violation.

D. **Off-the-Clock Smartphone Use** – *Allen v. City of Chicago*, Case No. 1:10- CV-03183 (N.D. Ill. May 24, 2010) (pending appeal)

1. High profile case now at the Seventh Circuit.

2. A sergeant for the Chicago Police Department sued the City of Chicago for unpaid overtime related to off-the-clock smartphone use.

3. The police department issued police officers smartphones and required them to respond to work related e-mails, text messages and voicemails around the clock while off duty. Allen alleged that he was expected to immediately respond to all work-related communications during off-the-clock hours without compensation to which he was entitled under the FLSA.

4. The district court denied the city's motion to dismiss, although the court did "wonder about the ability to treat on a class basis the broad range of situations in which police personnel may 'respond' to messages that are sent to them on PDAs, the extent to which those responses might constitute 'work, and the extent to which any work might not be compensable because it is '*de minimis*.'"

5. Extent of smartphone use among the officers varies. While some employees check their smartphones constantly, others use them infrequently. In light of the FLSA's *de minimis* exception, which would likely not compensate the infrequent user, it remains to be seen how the Seventh Circuit will treat a sergeant who is expected to respond immediately, and who receives a number of calls, texts, and messages on a daily basis.

6. **Practice Pointer** → If you provide smartphone devices to employees, you as the employer are responsible for ensuring any off-the-clock hours are properly recorded and paid.

E. **Employer Knowledge of Work = Compensable Time** – *Bailey v. TitleMax of Georgia, Inc.*, 776 F.3d 797 (11th Cir. 2015)

1. The Fair Labor Standards Act requires payment for all hours an employer *suffers or permits* an employee to work.

2. Plaintiff presented credible – though contested – evidence that managerial employees both changed the hours he recorded on his timesheet (in a handful of instances) and instructed him to modify his timesheets to

reduce the hours worked. This presented a question as to whether unpaid work time had taken place with employer knowledge.

3. Eleventh Circuit found that the employer knew or had reason to know employee underreported his hours.

4. Lesson: an employee's timesheet is not a panacea against claims that he or she worked additional time where managerial employees may have corrupted that timesheet, either directly or through their communications to the employees.

5. **Practice Pointer** → Good timekeeping practices remain step one in FLSA compliance; managerial training to ensure management actions and/or communications do not create liability is a close second

F. **Importance of "Good Faith Safe Harbor" Policy/"Window-of-Correction Defense"** – *Ellis v. J.R.'s Country Stores*, Inc., 779 F.3d 1184 (10th Cir. 2015)

1. Tenth Circuit upheld the employer's salary basis of payment, rejecting the Plaintiff's claim that an isolated deduction from an exempt employee's salary destroys exempt status.

2. The plaintiff, Ellis, worked as a manager at one of defendant's stores. As a manager plaintiff was expected to work a minimum of 50 hours per week and a minimum of five days per week. Defendant paid plaintiff a weekly salary of $600+ and classified her as exempt.

3. Following a week in which she reported working only 40.91 hours, Plaintiff received a paycheck in the amount of $593.80, from which defendant deducted $31.20 due to her partial-day absence.

4. The Tenth Circuit concluded that defendant did not have an "actual practice of making improper deductions" such that it forfeited its ability to treat plaintiff as exempt. The Court observed that plaintiff worked less than 50 hours per week on "13 separate occasions," but defendant reduced her pay "on only one occasion." Further, defendant's employee handbook "clearly communicate[d] that improper deductions [were] prohibited," and provided a mechanism for reimbursement of improper deductions made in good faith.

5. The Court concluded that the defendant could take advantage of the "window-of-correction defense" which permits employers to maintain their exemptions by reimbursing employees for improper deductions that "are either isolated or inadvertent." The Court held that the defense applies when the deduction is isolated or inadvertent.

6. **Practice Pointer** → *Ellis* illustrates the importance of maintaining a clear policy prohibiting improper deductions from wages of exempt salaried employees. Such a policy enhances the likelihood of avoiding liability by reimbursing employees for deductions that are inadvertently or improperly made.

G. **Office Worker Exempt Pursuant to Administrative Exemption** – *Ramsey v. Wallace Elec. Co.*, No. 1:13-CV-03808, 2015 WL 1413331 (N.D. Ga. Mar. 27, 2015) (pending appeal)

1. Employees who support businesses performing office functions are often dubbed "administrative" employees, whether for wage-and-hour purposes or otherwise. The question under the Fair Labor Standards Act is whether they are administratively exempt from overtime. In *Ramsey*, an office worker for an electrical services firm was found to qualify.

2. As an office worker, Ramsey administered Human Resources forms and company policy, dealt with customer issues and handled invoicing with "rare" review from her superiors. She also managed the company's benefits program and tracked vacation time.

3. The court found that her duties were "exclusively administrative" and that she exercised judgment both in creating invoices and through her responsibility for handling discrepancies in timesheets and invoices.

4. **Practice Pointer** → *Ramsey* reinforces that administrative employees qualify for the exemption where they autonomously handle important office functions. Employers must regularly analyze how they classify office staff under the FLSA.

H. **Wait Time Not Compensable** – *Jones v. Hoffberger Moving Servs. LLC*, No. CIV. JKB-13-535, 2015 WL 1321469 (D. Md. Mar. 24, 2015)

1. The United States Supreme Court's 2014 decision in Integrity Staffing clarified that, under the Portal-to-Portal Act, preliminary and postliminary tasks are not compensable even if potentially done for the employer's benefit, provided they are not integral and indispensable to the job functions for which a person is hired.

2. Applying this concept, Maryland's federal district court rejected FLSA claims seeking compensation for waiting time and other similar categories of preliminary and postliminary activity.

3. *Jones* concerned a common allegation of field-based employees in construction and related fields as such employees often gather at an employer location or "yard" before deploying to a work site.

4. Plaintiffs claimed unpaid wages were owed for time spent: (1) waiting at the warehouse each morning before traveling to jobsites; (2) travelling from the warehouse to jobsites; (3) waiting at the jobsite before moving trucks and moving equipment had arrived; and (4) travelling—after completing work at a jobsite—to pick up paychecks at the warehouse.

5. Court found that the wait time spent at Defendant's warehouse, time spent traveling from the warehouse to a job site and time spent picking up paychecks were non-compensable.

6. **Practice Pointer** → Employers must analyze preliminary and postliminary activities of employees to ensure compliance with the Portal-to-Portal Act.

I. **Travel Time Not Compensable** – *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, No. CIV.A. 13-11455-DPW, 2015 WL 1442535 (D. Mass. Mar. 31, 2015)

1. Judge dismissed pre- and post-shift travel time claims.

2. Plaintiffs argue that when their shifts begin in one location and end in another, they should be compensated for the time that it takes them to travel from the end of their assigned route back to where they began.

3. Court said that the crucial question is not whether the work was voluntary but rather whether the (employee) was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.

4. Court considered whether the activity of the employee was part and parcel of the employees principal work duties.

5. There is no factual dispute about the activity of the employees after the completion of their final route of the day; employees are completely free to go wherever they want and they are not required to check out or return any equipment to their starting point. Employees plainly do not engage in any principal activity after completing their final route of the day.

6. **Practice Pointer** → Pre- and post-shift travel time may, but is not always compensable. Employers must analyze whether the work performed as travel time is for the benefit of the employer.

II. NOTABLE DOL ACTIVITY – FLSA REGULATIONS

A. On June 30, 2015, Dept. of Labor proposed rule changes.

B. DOL has asked for comments before finalizing proposed rules.

1. Comment period closed September 4

2. DOL received over 50,000 comments in last week of comment period

3. A total of over 247,000 comments were received

C. We expect two major changes:

1. Substantially raising the Salary threshold. DOL suggested a new base salary threshold of $970 per week ($50,440 per year), up from $455 per week.

a. This change in the law would impact 5 to 10 million workers.

b. Based on information submitted by persons influential to DOL (certain economists, Senators, and for DOL Secretary), we expect the final salary threshold number will end up between $800 and $1100 per week.

c. Regional variation.

2. Modification or elimination of the existing primary duties tests used to determine whether employees meet exempt status.

a. As part of the comment process, 96 pages into their report, DOL asked for input on the following issues for consideration in the final rule:

(i) What, if any, changes should be made to the duties tests?

(ii) Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?

(iii) Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?

(iv) Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests structure?

(v) Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt

duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

b. DOL may choose a "division of labor" test to replace the "primary duties" test. For example requiring a specific number of work hours to be spent performing exempt duties—consider a supervisor is responsible for hiring, firing, discipline, evaluation, and administrative tasks of major significance. But the supervisor spends anywhere from 50%–75% of her time working in the field with the other hourly workers performing similar tasks.

D. Timing

1. Public Comment resulted in nearly 250,000 submissions. How many will be reviewed?

2. DOL needs to draft rules, hear testimony, and then rules need to be published.

3. We do not expect publication before 2016, and quite possibly not until following the presidential election.

E. Why should the Finance Officer care?

1. Since Act 10, government entities have massively restructured all departments to eliminate obsolete positions, to strengthen management, and to fairly compensate employees. A lot of employers sought to maintain strong management-employee relations. Employers spent a lot of time, resources, and political capital.

2. Problem zones:

a. "Working foreman" supervisors and the "road" supervisor

b. Multiple layers of exempt management

3. The solutions are not good.

a. The key challenge: avoiding the loss of good managers and avoiding creating reductions in management and supervision, while remaining ever mindful of pay compression issues.

b. Department restructuring

c. Position Restructuring

d. Reductions in compensation (hint, the answer is not the annual salary divided by 2080).

e. Intergovernmental cooperation.

F. What about existing Wisconsin law?

G. What should the Finance Officer do? Fully understand exposure and develop a plan

1. Understanding Exposure

a. Analyze existing exempt classifications and immediately identify any "fringe" exempt positions.

b. Update job descriptions to reflect the reality of the work environment. Consider restructuring or redefining positions

c. Track hours worked and paid. Accurate records are key to defense, but also are key to understanding whether restructuring is necessary.

d. Monitor off-duty "work."

e. A division of labor test will create a tremendous record keeping burden of time tracking and task tracking. Employers need to consider their current recordkeeping abilities, available options and training of supervisors.

2. Develop a Plan

a. Budget for possible changes to classifications

b. Address comp plan discrepancies

c. Department heads need to begin thinking about and developing plans for restructuring the Department and positions.

d. Identify ideal supervisor relationships

e. Add exempt duties

f. Train supervisors to perform administrative and managerial duties and to focus on duties.

g. Update job descriptions

h. Update employer policies regarding overtime and exempt status

i. Address payroll recordkeeping issues and timesheets/task sheets

j. Consider "fluctuating work week" agreements (overtime at half time rate, but on top of a guaranteed weekly salary). Key components: (1) the hours must routinely fluctuate each workweek; (2) mutual understanding the weekly salary is paid regardless of the number of hours worked; (3) overtime is calculated by dividing the weekly salary by the total hours worked and then by ½ to create a half-time overtime rate. Salary deduction rules do not necessarily apply.

III. NOTABLE DOL ACTIVITY - INDEPENDENT CONTRACTOR STATUS

1. On July 15, 2015, the DOL issued guidance regarding its interpretation of independent contract status under the FLSA, which DOL emphasizes an expansive reading of the term "employee." As a result of DOL's interpretation, we expect litigation regarding independent contractor status to increase.

2. The law in this area is already grotesquely complex and uncertain—extreme caution by employers is necessary. Worker misclassification as a problem for the employer is just the tip of the iceberg. Allegations of FLSA and wage and hour violations, worker's compensation damages exclusively attributed to the employer, tax liability, among other problems.

   A. IRS Standards

   B. Unemployment Division standard

   C. Worker's compensation standard

   D. Labor Standards

   E. Anti-discrimination law

3. Avoiding the Traps

   A. Failing to understand what is required for independent contractor status and drawing improper assumptions about who is at fault for misclassification.

   B. Clearly identify the relationship—is it an employment relationship or an independent contractor relationship? If it is the latter, then is it really and how can you prove it?

C. Only use a business entity as an independent contractor, and only one with insurance coverage, their own equipment, and their own employees.

D. Rely on effective independent contractor agreements

E. Do not always use the contractor's version of the agreement, instead make changes to it or use your own.

F. Negotiate the terms

G. Follow through to ensure contractual obligations are fulfilled

H. Keep records, including payment records, time records, and other necessary documents

I. Hold contractors accountable to maintain insurances and other protections for the direct and indirect benefit of the contracting party (the municipality).

CONFLICTS OF INTEREST - WHEN AN EMPLOYEE MISUSES THE OFFICE

With only four employees left in the City's Building Inspection Department, morale is low and employees are drained from feeling overworked. The Secretary of the Building Inspection and Planning Department informed you she heard that a local developer gave the Assistant Building Inspector two $25 gift cards to a national department store chain that sells tools, appliances, electronics and clothing. Apparently, the local developer was very appreciative of the Assistant Building Inspector's "prompt" and "thorough" building inspections over the previous year and in appreciation for the Departments quick turnaround on issuing permits. The Assistant Building Inspector did not tell you that he received any gift cards.

The Electrical Inspector told you that the Assistant Building Inspector told the developer that he could not accept the gift cards. He also heard the developer may have mailed the cards to his home. He doesn't know what happened to the cards.

That afternoon, you hear the Assistant Building Inspector talking about the new power drill he purchased from that same national department store chain.

Because your job is not hard enough, you also learn that a Council member is actively encouraging members of the Council to contract with his brother's firm for insurance brokerage services. The Council member works at the firm, but claims he is not an employee, does not receive a paycheck, and only helps out because its "family."

What do you do?

I. OVERVIEW

A. Objectives

1. Understanding Wisconsin's ethics laws governing public-sector employees.

2. Understanding how to effectively comply with these laws and with government policies regarding ethics.

3. Understanding strategies for managing an employee who allegedly violated ethics laws and policies.

B. Preliminary considerations

1. "It's not the crime, it's the cover-up."

2. "It's all about perception."

3. The law is not black and white. It is grey. In this area of the law, you need to avoid the gray.

4. Employees may not be aware of their obligations under ethics statutes and policies relating to their employment.

5. Educating employees on the professional boundaries of one's office is the best deterrent.

6. Ignorance is not bliss when it comes to professional ethics. Employees who violate the rules and laws of professional ethics can be subject to adverse legal consequences regardless of their intent, including conviction.

II. FUNDAMENTAL LEGAL PRINCIPLES

A. **Local ordinances, Oaths of Office, and organizational policies.** They vary, and they matter.

B. **Duty of Loyalty.** Public officeholders are charged with the fiduciary responsibility of exercising official duties with undivided loyalty. A public officeholder "occupies a fiduciary relationship to the political entity on whose behalf" the officeholder serves. 63C AM. JUR. 2d § 247 at 690. The Wisconsin Supreme Court has stated its opinion as to the importance of this duty: "All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public—to protect, advance, and promote its interests, not their own." *Pickett v. School District No. 1*, 25 Wis. 551, 556 (1870); *see also Heffernen v. Green Bay*, 266 Wis. 534, 541-542 (1954). Wisconsin Attorneys General have also made similar statements: "As a trustee of

the public, a public officer owes an undivided duty to the public he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public." 58 OP. ATT'Y. GEN. 247 (1969).

C. **Cause for Removal.** Wisconsin Statute Section 17.001 defines "cause" for removal as inefficiency, neglect of duty, official misconduct, and malfeasance in office.

D. **Common law, due process, and other considerations.**

E. **Private Interest in Public Contracts**

1. Purpose. To protect the public from loss occasioned by unscrupulous officers who would seek to profit from their office by letting contracts, etc., not on their merits, but in a manner best suited to enrich themselves. 23 OAG 454 (1934).

2. Types.

a. Private conduct. § 946.13(1), Wis. Stats., provides:

Any public officer or public employee who does any of the following is guilty of a Class E felony:

(a) In the officer's or employee's private capacity, negotiates or bids for or enters into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer's or employee's capacity as such officer or employee in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer's or employee's part.

1. For example, a school board member who bids for a construction contract with the district, while at the same time being required or authorized to approve such contract, probably violates the statute.

2. In *State v. Venema*, 257 Wis. 2d 491, 650 N.W.2d 898 (Ct. App. 2002) the court found sufficient evidence that the defendant engaged in prohibited "negotiations" because the defendant park manager asked the town supervisor, who was responsible for drafting park contracts, to increase the defendant's compensation to 50% of park receipts.

b. Public or official conduct. § 946.13(1)(b), Wis. Stats., provides:

(b) In the officer's or employee's capacity as such officer or employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part.

1. For example, a town board supervisor who votes to approve a contract under which his construction company will provide services for the Town probably violates the statute.

2. *State v. Stoehr,* 134 Wis. 2d 66, 77, 396 N.W.2d 177 (1986), this is a strict liability statute.

Exemptions from coverage of § 946.13(2).

(a) Contracts in which any single public officer or employee is privately interested that do not involve receipts and disbursements by the state or its political subdivision aggregating more than $15,000.00 in any year.

. . . .

***And more* – see Wis. Stat. § 946.13(3) – (11).**

3. Private conduct. In *Portage County*, Dec. No. 67296 (2008), the employer did not have just cause to discharge the grievant for alleged financial conflict of interest after the grievant hired another employee to do work as a subcontractor for the employer outside of the employee's normal work hours. The employer alleged the grievant was accepting low bids from the fellow employee in order to keep the projects off the employer's radar and thus be able to split the profits with the other employee. However, the arbitrator did not find a conflict of interest because the projects were bid and performed appropriately. Moreover, the arbitrator found that the employer lacked just cause to discipline the employee for violating rules unless the employee knew, or should have known, that his conduct was improper. Lastly, since the grievant never saw the employer's written personnel policies regarding project bidding and the employer never trained the grievant with respect to them, the employer cannot hold the grievant accountable to those policies.

4. Public or official conduct.

a. Example: A school board member should not vote on or debate the prohibited contract, both at the time the contract is entered into

and at any subsequent time that school board proceedings relate to the contract. .

b. A school board member who contracts with the board to provide goods and services may be liable under the statute, even though he is the sole provider of such goods or services in the immediate area.

5. What is the impact on the School District? Any contract entered into in violation of § 946.13 is void and the governmental entity incurs no liability thereon.

6. What is the impact on the violator? Any public officer found guilty of violating the terms of § 946.13 is subject to up to a $10,000 fine or imprisonment for not more than two years, or both.

7. Once a public officer has a prohibited pecuniary interest in a contract, resigning from the agency will not insulate him from liability.

F. **Misconduct in Public Office**

1. Section 946.12, Wis. Stats., states: ***Any public officer or public employee who does any of the following is guilty of a Class E felony:***

(1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or

(2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or

(3) Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or

(4) In the officer's or employee's capacity as such officer or employee, makes an entry into an account or a record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies;

(5) Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty

anything of value which the officer or employee knows is greater or less than is fixed by law.

2. Re: § 946.12(1). In *State v. Lombardi*, 8 Wis. 2d 421, 99 N.W.2d 829 (1959) the convictions of a county sheriff for failure to perform a mandatory duty in tolerating the operation of a house of "ill fame" were affirmed.

3. Re: § 946.12(2), (3)

   a. In *State v. Kort*, 54 Wis. 2d 129, 194 N.W.2d 682 (1972), the convictions of a town supervisor for exceeding lawful authority in claiming and receiving reimbursement for expenses and lost wages for time spent on official business were reversed, because there was a legitimate question whether such expenses and lost wages were "compensation," the defendant could not be found to have known his actions were in excess of his lawful authority within the meaning of the statute.

   b. In *Manitowoc County Highway Employees,* Dec. No. 67175 (Millot 2009), the grievant worked for the County's Highway Department and was responsible for taking prison inmates to their approved work sites for the day. However, without the County's approval, the grievant took inmates for his personal use to do work on his personal property. The grievant was criminally charged with "Misconduct in Public Office" and his employer discharged him. The arbitrator found that the employer had just cause for discharging the grievant.

4. Re: § 946.12(5). In *Ryan v. State*, 79 Wis. 2d 83, 255 N.W.2d 910 (1976), the court said: This does not mean that the public officeholder can never accept a gift. Sec. 946.12(5), Stats., is only violated when that which was accepted was "for the performance of any service or duty" but any officeholder who accepts anything of value, even if it be a sausage for such a reason, subjects himself or herself to the possibility of prosecution."

5. Re: § 946.12(1) and (5).

   a. In *State v. Tronca*, 84 Wis. 2d 68, 267 N.W.2d 216 (1978), the court held that a person who is not a public officer or public employee could nevertheless be convicted as a party to the crime of misconduct in public office in connection with the payment of money to a third party in exchange for an alderman approving the transfer of a liquor license.

b. In *City of Lake Geneva,* Dec. No. 45889 (1992), an arbitrator found that the employer lacked just cause for suspending the grievants after the grievants accepted and split a ten dollar gratuity for clearing a brush pile for a citizen of the city. The grievants' job duties included removing citizens' brush piles. The employers' rules and Wis. Stat. § 946.12(5) prohibit the employees from accepting gratuities for performing their official functions. The District Attorney found that the grievants technically violated the Misconduct in Public Office statute. However, given the nature of the offense and the small amount of money, the District Attorney did not find felony charges appropriate. Despite the lack of criminal charges, the City decided to discipline the grievants with 10 day suspensions without pay. The arbitrator found that the Employer's Rules required a prior written warning notice before issuing a suspension. Therefore, the suspensions were vacated and written warnings were to be issued.

6. Penalty. A conviction under any of the subsections § 946.12 is punishable by up to $10,000 fine or imprisonment for not more than two years, or both.

7. Defense. In *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974), the court found that if a public official relies in good faith on the legal opinion of a governmental officer whose statutorily created duties include the rendering of legal opinions as to actions of specific individuals or groups, then that public official's otherwise unlawful actions under § 946.13 may be excusable under certain facts.

G. State Law - Codes of Ethics for Local Government Officials and Employees

1. Section 19.42(7w) defines local public office as any of the following offices (except an office specified in sub. (13)):

(a) An elective office of a local governmental unit.

(b) A county administrator or administrative coordinator or a city or village manager.

(c) An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(cm) The position of member of the board of directors of a local exposition district under subch. II of ch. 229 not serving for a specified term.

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(e) The position of member of the Milwaukee County mental health board as created under s. 51.41 (1d)

2. Section 19.59, Wis. Stats., states:

(1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated[…]This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

(b) No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

(br) No local public official or candidate for local public office may, directly or by means of an agent, give, or offer or promise to give, or withhold, or offer or promise to withhold, his or her vote or influence, or promise to take or refrain from taking official action with respect to any proposed or pending matter in consideration of, or upon condition that, any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, any person who is subject to a registration requirement under s. 11.05, or any person making a communication that contains a reference to a clearly identified local public official holding an elective office or to a candidate for local public office.

(c) Except as otherwise provided in par. (d), no local public official may:

2. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

3. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

(d) Paragraph (c) does not prohibit a local public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a local public official from taking official action with respect to any proposal to modify a county or municipal ordinance.

(1m) In addition to the requirements of sub. (1), any county, city, village or town may enact an ordinance establishing a code of ethics for public officials and employees of the county or municipality and candidates for county or municipal elective offices. (Sample provisions for a new ordinance can be found in subsection (3) of this statute.)

(7)(a) Any person who violates sub. (1) may be required to forfeit not more than $1,000 for each violation, and, if the court determines that the accused has violated sub. (1)(br), the court may, in addition, order the accused to forfeit an amount equal to the amount or value of any political contribution, service, or other thing of value that was wrongfully obtained.

H. **Arrest and Conviction Record Discrimination under the WFEA.**

1. An "arrest" is defined broadly as "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(1).

2. Suspension pending disposition of criminal charges and the Substantially Related Test. An employer has an affirmative defense against a discrimination claim under the arrest and conviction record statute, wherein the statute permits an employer to suspend an employee subject to a pending charge if the circumstances of the charge substantially relate to the circumstances of the job.

3. When does the affirmative defense apply—when does "the circumstances of the charge substantially relate to the circumstances of the particular job?" Does the job present circumstances which foster criminal activity including the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

4. Independent action by the employer instead of reliance on the criminal

investigation and disposition of the pending charges. The *Onalaska* Defense.

A. *Betters v. Kimberly Area School District*, ERD Case No. CR200300554 (Nov. 28, 2007 LIRC) An employer does not violate the arrest record discrimination law when it conducts its own investigation and concludes from its own investigation that the individual violated Department rules based on information independent of the arrest and of the arresting authority.

B. The employer must consider independent information. Independent information is not the police report, the criminal complaint, or statements made by or other information provided by the prosecuting or arresting authority. Independent information is interviewing and obtaining an admission from the employee, statements to the employer by others who witnessed the conduct, direct observations made by the employer, an investigation by the employer that made use of information obtained from a contemporaneous police investigation.

5. An employer has no duty to accommodate an arrest or conviction record.

6. Disqualification from employment if convicted of certain crimes (e.g. Court ordered restrictions, Class C Drivers Licenses, or the Lautenberg Amendment precluding a sworn law enforcement officer from possessing a firearm if convicted of a felony or of a domestic violence related misdemeanor).

I. *Garrity* Warnings

1. United States Supreme Court found that during an investigation, when an individual is given a choice between incriminating himself or losing his job, the individual's statements are not voluntary, but coerced, and the Fifth Amendment bars the use of the individual's statements in a subsequent criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967). In *Uniformed Sanitation Men* and *Broderick* (1968), the Supreme Court expanded on *Garrity* (barring use of admissions) to require reinstatement of employees who refused to answer questions without proper warning.

2. Fundamental Principle: When the Government uses its power to give a citizen no real choice between silence and waiver, the Constitution is violated.

3. What is a *Garrity* Warning?

A. An explicit order: "You are ordered to truthfully and completely

answer the questions posed to you. Nothing you say, nor the fruits thereof may be used against you in any criminal proceeding. Your failure to truthfully and completely answer questions posed to you may result in discipline up to and including discharge." See examples of *Garrity* Warnings.

B. In the absence of an order, rule or policy warranting a sanction, the court reviews the "totality of the circumstances." Subjective and objective standard: Whether a person claiming to have made statements under the threat of a sanction subjectively believed a sanction existed and whether this belief was objectively reasonable. *United States v. Friederick*, 842 F.2d 382, 395 (D.C. Cir. 1998).

4. Can the employee refuse to come to the investigatory meeting at all? Probably not.

5. Negative Inferences: Without *Garrity*, what can I do when the employee takes the Fifth? With Probative Evidence: The employer may draw adverse inferences from the individual's refusal to answer questions when probative evidence is offered against the individual.

6. Without Probative Evidence: an employer's "direct inference of guilt from silence is forbidden." The employer may not draw adverse inferences based solely upon an individual's decision to invoke his or her Fifth Amendment privilege.

7. Heightened burden of proof for the prosecutor when *Garrity* is given by the employer. The evidentiary exclusion applies not only to the statements, but also to any information later derived from those statements. Government must present an independent and legitimate source in the face of any disputed evidence. This requires the government to prove the evidence was derived from a source that is "wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (implying a criminal defendant raising a coerced-confession defense is in a better position than if the same defendant exercised his or her Fifth Amendment rights at trial).

8. Untruthful statements: Without *Garrity*, can the employee lie? *Garrity* does not provide immunity for false statements when the statements, if true, would have been entitled to immunity. *Herek v. Police & Fire Comm'n*, 226 Wis. 2d 504, 514–16 (Ct. App. 1999) Giving a false statement can be a separate crime (perjury) for which *Garrity* does not preclude prosecution.

9. Before any employee is questioned:

a. Are there any law enforcement implications? If so, report what you know to a law enforcement agency before questioning.

b. Conduct as much investigation as possible without interviewing the accused employees.

c. Consider *Garrity* implications for the possible criminal case. (1) Likelihood of successful prosecution; (2) Speed of criminal matter; (3) Cost of delay to your government entity; (4) Need for employee admissions to prove your case.

d. Question the accused. Obtain Voluntary statements (Miranda-like) first. Then consider issuing a *Garrity* warning. Preempt danger of ambiguity.

e. What to do/not do with the information you receive. (1) Handling requests/demands from the criminal prosecutor/investigator; (2) Handling public records requests; (3) Dangers of public hearings

III. WHAT SHOULD YOU DO?

A. Review policies and ordinances, and train employees regarding conflicts of interest and misconduct in office. Review and, if necessary, develop policies addressing professional ethics in the workplace. Educate every manager and employee on the policy and ethics laws.

B. Respond promptly to allegations of impropriety. Remember, the press loves a cover up more than they love the crime.

C. Carefully scrutinize potential conflicts. If the issue doesn't seem right, then work with the local municipal attorney before it spins out of control and before political carnage arises.

D. If allegations of misconduct in office or conflict of interest arise, then be prepared to notify law enforcement of what you learn.

E. Conduct a thorough, fair and impartial internal investigation.

F. Obtain voluntary statements, but be prepared to issue a *Garrity* Warning to the accused during the investigation. Consider proper timing of the issuing the *Garrity* Warning so as to minimize any harm to any criminal investigation of prosecution.

G. Conduct your internal investigation without relying solely on any criminal investigation.

H. Make careful decisions regarding penalty based on the employee's record of service. If basing the decision to discipline solely on a conviction, then remember to consider the relationship between the offense and the employee's job duties.

I. Be prepared to deal with the public relations issues.

J. Restore the public trust. Update and implement policies, retrain employees and take other appropriate action to restore trust.