

Hire, Retire, and Everything In Between



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Topics Covered

- ▶ **Hiring Processes**
- ▶ **Employee Handbooks**
- ▶ **Unemployment Compensation**
- ▶ **Evaluation Procedures**
- ▶ **Leave Rights**
- ▶ **Layoff**
- ▶ **Hours of Work**
- ▶ **Exit Interviews & Surveys**



Job Descriptions - Hiring of Employees

Job Description Legal Requirements

- ▶ PI 8.01(2)(q)1, Wis. Administrative Code
- ▶ **Position descriptions are required for all licensed personnel:**
 - Pursuant to PI 8.01(2)(q)1 of the Wisconsin Administrative Code, position descriptions are required for all licensed personnel and written evaluations must be based upon the board's adopted position description, including job-related activities.

Job Description Legal Requirements

- ▶ Job descriptions have taken on heightened importance in light of the Americans with Disabilities Act (ADA) and Wisconsin Fair Employment Act (WFEA).
- ▶ The ADA defines a disability as:
 - a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - a record of such impairment; or
 - being regarded as having such an impairment.

Job Description Legal Requirements

- ▶ **Qualified Individual:** A qualified individual with a disability is *“an individual with a disability who, with or without reasonable accommodation, **can perform the essential functions of the employment position** which the individual holds or desires.”*
- ▶ **Identification of Essential Functions in a Job Description:** Because an individual is considered qualified for employment under the Americans with Disabilities Act if he or she can perform the essential functions of the position, **each job description must identify the essential functions of the job.**

Job Description Legal Requirements

- ▶ The district's job descriptions are structured to maximize the district's ability to determine whether the candidate/employee can perform the **essential functions** of the job.
- ▶ “**Essential functions**” means the *fundamental job duties* of the employment position and does not include the marginal functions of the position.
- ▶ Those charged with recommending candidates for hire and evaluating employees will base their recommendations for selection/evaluation primarily on an applicant's ability to perform the essential functions of the job.

Essential Functions – EEOC

- ▶ The Equal Employment Opportunity Commission (EEOC) has offered the following advice on defining Essential Functions:
 - Review the purpose of the position and the importance of the actual job functions in achieving the purpose. In evaluating the importance of a job function, school officials should consider:
 - The **frequency** at which the function is performed;
 - The **amount of time** spent on the function;
 - Whether the function requires **specialized skill or training** inherent to the position;

Essential Functions – EEOC (Continued)

- ▶ Review the purpose of the position and the importance of the actual job functions in achieving the purpose. In evaluating the importance of a job function, school officials should consider:
 - The **number of employees** qualified and available to perform the function; and,
 - The **consequences** of not performing the function.



Essential Functions – EEOC (cont.)

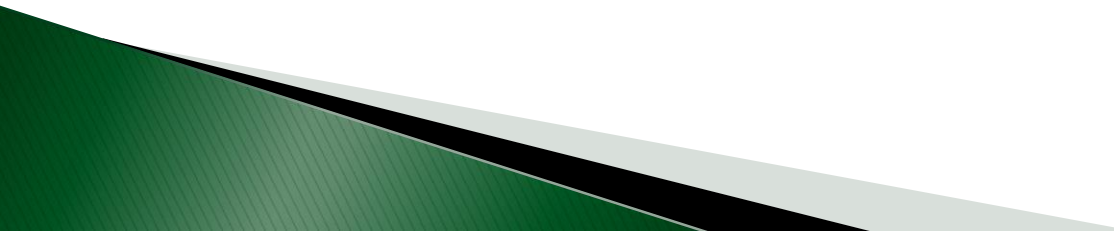
- ▶ EEOC advice on defining **Essential Functions**:
 - Focus on **the purpose of the job function and the result to be accomplished** rather than the manner in which the function is to be performed.
 - In other words, **if the position exists to perform the particular function, then the function is essential.**

Essential Functions – EEOC (cont.)

- ▶ EEOC has offered the following advice on defining **Essential Functions**:
 - Each job description should also provide **general guidance** for the performance of duties not specifically outlined in the job description. A statement such as “He or she shall perform such other duties as assigned” may provide this general guidance.
 - Finally, the job description should explicitly state **the goal or purpose of the position** and the title of the position or person to whom the employee reports.

Hiring of Employees

Introduction – Hiring

- ▶ General Processes
 - ▶ Posting of Vacancy Requirements
 - ▶ Employment Discrimination Issues
 - ▶ COVID-19 Issues
 - ▶ Applications
 - ▶ Selection of Applicants for Interviews
 - ▶ Interviews and Testing
- 

Hiring – Posting of Vacancy Notices

▶ Posting Requirements:

- Is it a change in assignment, a new position, or a vacancy?
- Is there any distinction between the internal posting/transfer process?
- Changes in assignment are different from hiring decisions and the two should not be confused.

▶ Likely Sources of Posting Requirements:

- Board Policy
- Administrative Procedures
- Employee Handbook
- **EXAMPLE**: Notification to employees on layoff/employees with reemployment options.

Hiring – Posting of Vacancy Notices

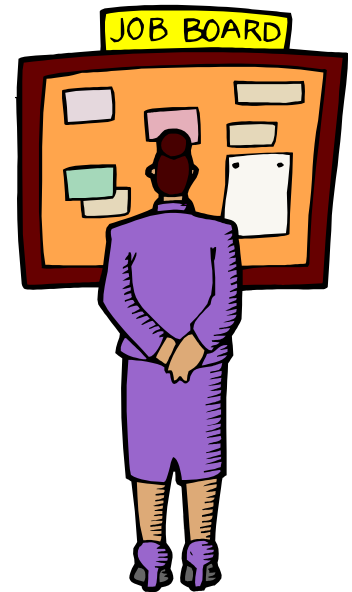
▶ Some Common Posting Requirements/Considerations:

- Position title
- Posting date
- Application deadline and statement notifying potential applicants:
 - That the district will neither accept nor review application materials received after the deadline has passed; or
 - That a completed application must be received by the deadline to ensure that the application receives full consideration.



Hiring – Posting of Vacancy Notices

- ▶ **Some Common Posting Requirements/Considerations:**
 - **Description of position duties and responsibilities** (link to online job description if possible – provide web address to online job description if paper posting).
 - **Brief description of the district.**
 - **Equal Employment Opportunities statement** and explanation of who may be contacted regarding any requests for accommodations in regard to the hiring process.



Hiring – Posting of Vacancy Notices

- ▶ **Some Common Posting Requirements/Considerations:**
 - Required education and/or certifications, qualifications, skills, work experience, etc.
 - Important terms of employment
 - Pay and benefit range (if known)
 - Location(s) of the position or work to be performed ***(subject to the district's ability to change, i.e. position is district-wide)***
 - Application instructions for internal and external applicants, including a list of all application materials (e.g., application, resume, letter(s) of reference, official transcripts, etc.) that must be submitted.

Hiring – Employment Discrimination

- ▶ Wisconsin and federal laws make it illegal for employers to discriminate against properly qualified individuals on the following bases:
- ▶ **Federal:** [ADA](#), [Title VII](#), [ADEA](#), [GINA](#) Pregnancy Non-Discrimination, [11 U.S.C. §525\(a\)](#), [USERRA](#), U.S. Department of Justice enforcement position: Title VII prohibits employment discrimination based on gender identity December 15, 2014, [memorandum of the Attorney General](#), [EEOC Enforcement Protections LGBT](#), [EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues](#)
- ▶ **State:** [§§111.321](#), [111.70\(3\)\(a\)3](#), [118.195](#)

Hiring – Employment Discrimination

Age	Sex
Race	Pregnancy
Creed	National Origin
Color	Working Conditions
Disability	Ancestry
Genetic Information	Sexual Orientation
Marital Status	Arrest and Conviction Record
Declaration of bankruptcy	Military Service
Sexual Orientation	Gender Identity
An individual's refusal to attend a meeting or to participate in any communication about religious matters.	Use or nonuse of lawful products off the employer's premises during nonworking hours
Union membership or activities	Visual, hearing or physical Impairment

Hiring – Employment Discrimination

➤ Arrest and Conviction:

- Although [Wis. Stats. 111.335\(3\)](#) of Wisconsin's Fair Employment Act provides that it is not employment discrimination for educational agencies, including school districts, to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony, the WASB cautions against a zero-tolerance approach toward employing (or not employing) unpardoned felons.
- See, e.g., http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii_conviction_and_safe.html and See, e.g., *U.S. EQUAL EMP. OPPORTUNITY COMM'N, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, available at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
- See [§§111.321, Wisconsin Statutes](#)

Hiring – Employment Discrimination

➤ **Arrest and Conviction** (continued):

- The circumstances of a particular situation may lead administrators to conclude that hiring someone who has a felony conviction on his or her record is in the best interest of the district. Furthermore, to the extent that a zero-tolerance policy would have a disparate impact on members of a protected class of applicants or employees, enforcement of the zero-tolerance policy could violate Title VII of the Civil Rights Act of 1964. See, e.g.,

[http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii_conviction_and_safe.ht](http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii_conviction_and_safe.html)

[ml.](http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii_conviction_and_safe.html) and See, e.g., **U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, available at:**

http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

- See [§§111.321, Wisconsin Statutes](#)

Hiring – Employment Discrimination

▶ Equal Pay Act



- The Equal Pay Act prohibits employers from discriminating against both male and female employees on the basis of sex by paying different rates ". . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" [\(29 U.S.C. 206\(d\)\)](#)
- Exceptions exist where the difference is due to a bona fide seniority system, merit system, a system which measures compensation by quantity or quality of production, or a differential based on a factor other than sex. The law is enforced by the EEOC.
- Cannot reduce wages in order to comply.

Hiring – COVID Related Questions

▶ HIRING DURING THE COVID-19 PANDEMIC

16. If an employer is hiring, may it screen applicants for symptoms of COVID-19?

*Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

17. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

*Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

▶ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Hiring – COVID Related Questions

▶ HIRING DURING THE COVID-19 PANDEMIC

18. May an employer delay the start date of an applicant who has COVID-or symptoms associated with it?

- ▶ *Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- ▶ *CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.
- ▶ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Hiring – COVID Related Questions

▶ HIRING DURING THE COVID-19 PANDEMIC

- ▶ ***19. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?***

*Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer if the employee is unable to work or would need to work in a location where the employee's presence could endanger others through exposure to COVID-19.

- ▶ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Hiring – Applications and Application Forms

- ▶ On the primary application form, make every effort to avoid seeking, directly or indirectly, any information relating to the characteristics protected by state or federal law.
- ▶ “Solutions” to obtaining necessary information include waiting until later in the process and creating reliable “firewalls.”



Hiring – Applications and Application Forms

- ▶ **Applicant Certification:** The District should require each applicant to certify that he/she:
 - personally completed the statement and carefully reviewed the information that he/she has disclosed;
 - understands and agrees that all information and records that he/she provides (directly or indirectly) to the school district in support of the application for employment are accurate, truthful, not misleading, and materially complete;
 - acknowledges an ongoing duty to immediately notify the district if it comes to his/her attention that anything was inaccurate, false, misleading, or materially incomplete; and
 - acknowledges that if the school district determines that he/she has omitted any required information from any responses or provided any false, inaccurate, or misleading information of any kind, the district may reject his/her candidacy for employment or terminate any employment that has already commenced.

Hiring – Applications and Application Forms

- ▶ **Not a Contract or Offer of Employment:**
 - Applications should also declare that:
 - The district is an **equal opportunity employer** that will not discriminate against an applicant on any prohibited bases.
 - The application itself is **neither an offer of employment nor an employment contract.**



Hiring – Applications and Application Forms

▶ Record Retention:

- Application materials received by the application deadline must be retained:
 - in accordance with the district's records retention policy or
 - the records retention law if the board has not adopted a records retention policy approved by the state Public Records Board.



Hiring – Applications and Application Forms

▶ Record Retention:

- **State:** DPI Record Retention Schedule for School Districts recommends:
 - 3 years for applicants not hired
 - 6 years after date of resignation, retirement or termination
- **Record Definition:** For purposes of Wisconsin’s public records law, “record” does not include drafts, notes, preliminary computations and like materials *prepared for the originator’s personal use. . . .*” Wis. Stat. §19.32(2).

Source: <http://publicrecordsboard.wi.gov/docview.asp?docid=15892&locid=165>

Hiring – Interview Process & Accepted Applications

▶ Application Materials Retention - Federal:

- **Accepted application materials**: Should be retained for no less than one year from the date in which (1) the record was created or (2) the district offers the position to an applicant, whichever is later.
- **Interviewer's Notes**: An interviewer's personal notes from the interviews need not be collected or retained, provided the notes were prepared solely for the interviewer's *personal* use during the interviewing/hiring process. If, however, the notes were made on an official district form or were created for the use of the committee as a whole, they must be retained pursuant to the state public records law. 29 C.F.R. §§ 1602.14, 1627.3(b)(1)(i).

Hiring – Applications and Application Forms

▶ **Unsolicited Applications:**

- The district need not retain unsolicited applications or applications received after a posted application deadline has passed provided the district has adopted a policy of refusing to accept unsolicited applications and applications received after a posted deadline, and the policy has been consistently enforced.

Hiring – Selection of Applicants for Interviews

▶ **Who to Interview:** Administrator discretion on who to interview is restrained by, or defined by:

- Board Policy
- Employee Handbook
- Administrative rules



Hiring – Selection of Applicants for Interviews

▶ **Screening of Applications:**

- Whenever possible, screen all applicants in conjunction with the position description and posting requirements.

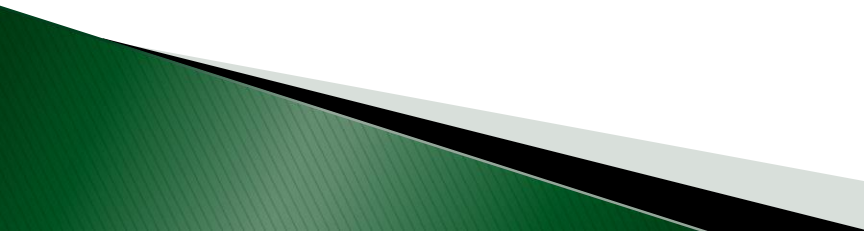
▶ **Scheduling of Interviews:**

- The administrator and/or interview committee should then schedule interviews with qualified applicants as soon as possible after the screening so the district can fill the position as quickly as possible.



Hiring – Interview Process

▶ **Written Questions:**

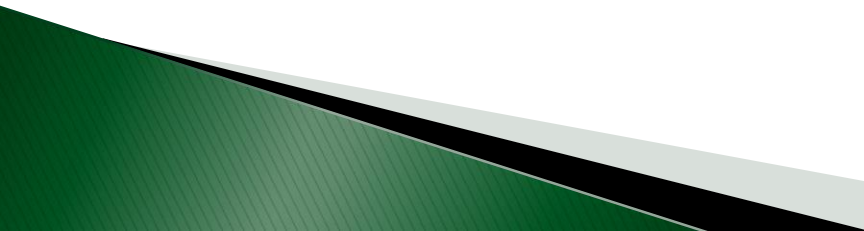
- Establish specific written interview questions that will help determine whether the candidate can adequately perform the essential functions of the position.
 - Interview questions may be solicited from team members or other administrators.
- 

Hiring – Interview Process

▶ **Written Questions:**

- To the extent possible, interview questions should elicit responses that describe the candidate's actual experiences as opposed to his or her hypothetical responses to a given situation or circumstance.
- Once questions have been established, the questions should be used for each candidate for the same vacancy.

Hiring – Interview Process - Questions

- ▶ **Interview questions to ask:**
 - **Previous work history** (including why he or she left or is considering leaving his or her current or former employer),
 - **Education, training and skill level** (but only to the extent of education, training or skill level reasonably related to the position), and
 - **Motivation to work for the district and career goals** (including whether the applicant is available for/willing to work overtime).
- 

Hiring – Interview Process - Questions

▶ Interview questions to avoid:

- Information relating to the characteristics protected by state and federal law, such as sex, race and age. To avoid claims of unlawful discrimination:
- The district should ***not*** ask for an applicant's **age or birth date**;
- The district should ***not*** ask for the name of the applicant's spouse, spouse's place of work or maiden name, or for any other information that would require an applicant to disclose his or her **marital status**.



Hiring – Interview Process - Questions

- ▶ **Interview questions to avoid (continued):**
 - The district should ***not*** ask about an applicant's **medical or accident history, physical abilities or limitations, history of worker's compensation claims or history of sick or family and medical leave usage.**
 - The district should ***not*** ask an applicant about his or her **country of citizenship.**
 - The district should ***not*** ask whether the applicant is pregnant, has **children or intends to have children.**

Hiring – Interview Process - Questions

▶ Interview questions to avoid – Arrest and Conviction:

- Although the district may inquire as to whether an applicant is subject to any pending criminal charges, the district should **not** inquire as to an applicant's prior arrest records.
- The district is prohibited from summarily rejecting an applicant on the basis of pending criminal charges if the pending charges do not substantially relate to the circumstances of the job.

Hiring – Interview Process - Questions

- ▶ **Interview questions to avoid – Use of Lawful Products:**
 - The district should ***not*** ask an applicant whether he or she needs a “smoke break” or
 - whether he or she would like to join the interview team for drinks at a local establishment after completing the “formalities” of the interview.

- ▶ **Interview questions to avoid – Personal Financial History:**
 - The district should ***not*** inquire as to an applicant’s credit or bankruptcy history.

Hiring – Interview Process - Questions

▶ Interview questions to avoid – Religion:

- The district should try to avoid inquiring as to whether an applicant is available to work on Saturday or Sunday because that question could require an applicant to disclose his or her membership in a certain religious group, National Guard or military reserves.
- If work on Saturday or Sunday is required, the district should indicate that it will make a reasonable effort to accommodate the needs of its employees.

Hiring – Social Media

- ▶ **Social Media Inquiries:** [Wisconsin Statute 995.55](#), provides that no employer, including a school district, may do any of the following:
 - Request or require an employee or applicant for employment, as a condition of employment, to disclose access information for the personal Internet account of the employee or applicant or to otherwise grant access to or allow observation of that account.
 - Discharge or otherwise discriminate against an employee for exercising the right to refuse to disclose access information for, grant access to, or allow observation of the employee's personal Internet account, opposing an employer practice that violates this new law, filing a complaint or attempting to enforce rights granted to employees under this law, or testifying or assisting in any action or proceeding to enforce such rights.

Hiring – Social Media

- ▶ **Social Media Inquiries:** [Wisconsin Statute 995.55](#), provides that no employer, including a school district, may do any of the following:
 - Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's personal Internet account.

Hiring – Social Media

▶ **Social Media Inquiries:** [Wisconsin Statute 995.55](#) also provides for a partial list of the express exceptions that apply to the above listed restrictions on employers, this new law does not prohibit an employer from doing any of the following:

1. Viewing, accessing, or using information about an employee or applicant for employment that can be obtained without access information or that is available in the public domain.
2. Requesting or requiring an employee to disclose the employee's personal electronic mail address.

(Note: Although this exception within this law does not reference applicants for employment, it is unclear if this new law actually intends to prohibit an employer from requesting or requiring an applicant to provide a personal electronic mail address.)

Hiring – Medical Examinations & Inquiries

- ▶ **Pre-employment Medical Examinations:**
 - An Employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions.



Hiring – Medical Examinations & Inquiries

- ▶ **Employment Entrance Examination:** An Employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if
 - **(A) all entering employees are subjected to such an examination regardless of disability;**



Hiring – Medical Examinations & Inquiries

- ▶ **Employment Entrance Examination:** An Employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if
 - (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a **confidential medical record**, except that:

Hiring – Medical Examinations & Inquiries

- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and
- (C) the results of such examination are used only in accordance with the limits set forth in statutes.

Employer Defenses to a Charge of Discrimination – Pre-employment testing

- Defense:
 - Test will be upheld if alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been **shown to be job-related and consistent with business necessity**, and such performance cannot be accomplished by reasonable accommodation, as required under the ADA and other applicable law.

Hiring – Physical Testing & Inquiries

▶ Physical Testing:

- Job-Related and Business Necessity
- Ability to Perform with or without an accommodation.
 - <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>
- Individual doesn't pose a direct threat to the health or safety of other individuals in the workplace.
- Special Restrictions on Uncorrected vision, infectious or communicable diseases, illegal use of drugs & alcohol
 - <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

Hiring – Physical Testing & Inquiries

▶ Physical Testing:

- **Accommodation:** An employer may require an employee/applicant to provide documentation that is **sufficient** to substantiate that s/he has an Americans with Disability Act disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation.

<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

Hiring – Physical Testing & Inquiries

▶ Physical Testing:

- **Medical waiver:** An employer may not obtain the employee's complete medical records or information about any conditions that do not affect the employee's ability to perform the physical agility or physical fitness test safely.
- <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>



Hiring – Physical Testing & Inquiries

▶ Physical Testing:

- **Medical waiver:** Employers that require physical agility or physical fitness tests may ask an employee to have a physician certify whether s/he can safely perform the test.
- In this situation, however, the employer is entitled to obtain only **a note simply stating that the employee can safely perform the test or, alternatively, an explanation of the reason(s) why the employee cannot perform the test.**
- <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>



Hiring – Criminal Background Checks

- ▶ School districts are not required by law to perform criminal background checks on prospective or current school district employees.

<https://docs.legis.wisconsin.gov/document/statutes/50.065>.

- ▶ Department of Public Instruction (DPI) does perform criminal background checks on individuals who seek to be licensed as teachers in the State of Wisconsin, at the time the individual first seeks licensure, at renewal and every five years for employees with lifetime licenses. [Wisconsin Administrative Code PI 34](#).

Hiring – Criminal Background Checks

- ▶ Authorization for the Criminal Background Check from the Applicant
- ▶ May also review traffic records for applicants who are required to drive district vehicles or transport pupils.

Hiring – Reference Checks

- ▶ **Release:** Create a separate document on which an “authorize and release statement” signed by the applicant:
 - ▶ (1) allows the district to contact the applicant’s references to verify the truthfulness of the information provided on the application,
 - ▶ (2) authorizes the applicant’s references to respond to the district’s questions, and
 - ▶ (3) releases and holds harmless the district and those who provide information from any possible defamation claims and resulting liability.

Hiring – Reference Checks

- ▶ **Verification:** Reference checks should verify the information a candidate submitted in his or her application materials, supplement any information gaps and address any reservations the administrator may have about the candidate's ability to perform the job.



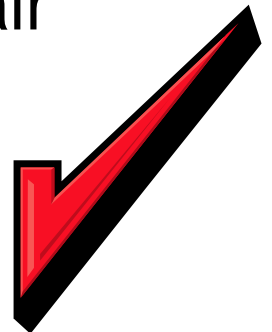
Hiring – Reference Checks

- ▶ **Former Employer:** If the reference check is with a former employer, the administrator should ask the former employer if it would hire the applicant again if given the opportunity to do so.
- ▶ These references checks should be detailed, completed on the approved form, focus on the applicant's ability to perform the job and also include a reference check from the candidate's current or most recent supervisor.



Hiring – Reference Checks

- ▶ [Wis. Stat. § 895.487](#), Provides that an employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith.
- ▶ This presumption can only be overcome by clear and convincing evidence that the employer knowingly provided false information in the reference; that the employer made the reference maliciously; or that the employer made the reference in a manner that violates the prohibitions against discrimination under the Wisconsin Fair Employment Act.



Hiring – Residency

- ▶ **Public Employee Residency Requirements**

Prohibited: With certain exceptions that are generally not applicable to school districts, the Act provides that no local governmental unit may require, as a condition of employment, that any employee or prospective employee reside within any jurisdictional limit. Residency requirements that are in effect as of July 2, 2013 do not apply and may not be enforced. Wis. Stats. Section [66.0502](#).

Hiring – Pre-Employment Drug Testing

▶ **Attorney General Opinion:**

- It is my opinion that a pre-employment drug testing program most likely would be upheld by the courts in situations where public safety and security create a strong governmental interest in the integrity of an employee's character and physical and mental faculties, and where the circumstances of collection are least intrusive.”

[76 Op. Att'y Gen. 257, 261 \(1987\)](#)

Hiring – Pre-Employment Drug Testing

▶ **Pre-Employment, Post-Offer Drug Testing:**

- If a district requires pre-employment drug testing, it should do so only after adopting a drug-testing policy that has been reviewed with the district's legal counsel to ensure that the testing does not:
 - violate the Fourth Amendment's restriction on unreasonable searches and seizures,
 - an applicant's right to privacy,
 - the Americans with Disabilities Act,
 - or the Genetic Information Nondiscrimination Act.

Hiring – Pre-Employment Drug Testing

- ▶ **Pre-Employment, Post-Offer Drug Testing:**
 - Moreover, once any such policy has been adopted, the district must ensure that the policy is enforced consistently and only upon those to which it has extended a conditional offer of employment.
 - The District should not require pre-employment drug screening to any applicants it has not actually given a conditional offer of employment.
 - Finally, the district must secure the results of any drug test and not disclose this information to the public or any non-essential board members or administrators.

Hiring – Nepotism and Code of Ethics for Public Officials

▶ **Anti-Nepotism Policies:**

- **Common law:** the general rule is that a public official may not participate in decisions concerning issues in which he or she has a direct pecuniary interest.
- **Wisconsin Criminal law:** Prohibits a public officer or public employee, acting in his or her official capacity, from participating in the making of a contract in which the officer or employee has a private pecuniary interest and from performing discretionary functions pertaining to the contract.

[Wis. Stats. 19.41](#)

Hiring – Nepotism and Code of Ethics for Public Officials

▶ Anti-Nepotism Policies:

- **Wisconsin Criminal law:** . It is also a crime for a public official or employee, in his or her private capacity, to negotiate, bid for, or enter into a contract with the school district when the public official or employee has a direct or indirect private pecuniary interest in the contract. [Wis. Stats. 946.13.](#)
- **Wisconsin Code of Ethics:**
 - Prohibits local public officials from using their public position to obtain financial gain or anything of substantial value for their private benefit or for their immediate family.
 - The personal gain prohibited can be anything of value, which means any money or property, favor, service, payment, advance, forbearance, loan or promise of future employment. [Wis. Stats. 19.59](#)

Hiring – Nepotism and Code of Ethics for Public Officials

▶ **Anti-Nepotism Policies:**

◦ **Marital Status Discrimination:**

- State law specifically prohibits discrimination based on the employee's marital status, it provides a specific exception that permits board policies prohibiting an individual from obtaining a position in the school district where the individual would be directly supervised by his or her spouse.
- Such policies are justified by eliminating employment relationships that may result in conflicts of interest between an employee and a supervisor spouse Wis. STAT. [§ 111.345](#).

Hiring – Incompatibility of office For Public Officials

▶ Incompatibility of Office:

- Bars a person from holding two offices where:
 - One office is superior to another such that the duties exercised under each might conflict with the other; or
 - Where the nature and duties of two offices are such that public policy considerations bar one person from discharging the duties of both.

[Ottradovev v. City of Green Bay](#), 118 Wis. 2d 393, 396; 347 N.W.2d 614 (Ct. App. 1984).

Making the Hire

► Four very important things:

- Have a very clear understanding of who has the authority to extend a final offer of employment.
- Ensure the any offer of employment remains expressly contingent and revocable until you are 100% sure that all contingencies have been satisfied. (Do not inadvertently extend a binding offer of employment until all contingencies are 100% satisfied.)
- Do not create a contract when you do not intend for the position to be covered by a contract.
- Make sure that the candidate's expectations match your processes.

Making the Hire

- ▶ **Provide a Copy of the Position Description**
- ▶ **Provide a Copy of the Employee Handbook**
 - Obtain acknowledgement of receipt and responsibility to read/follow
- ▶ **Grooming or dress requirements:** The board is required by Wisconsin law to advise new employees of any grooming or dress requirements WIS. STAT. [§ 103.14](#).
- ▶ **Arrange Appropriate Orientation/Overview Meetings**
 - Employment Benefits / Payroll; Evaluation Processes, etc.
- ▶ **Arrange Initial Required Training** (e.g., training on reporting of child abuse and neglect, threat reporting)

Issues Under the Employee Handbook



Human Resources Management Under an Employee Handbook

- ▶ Fundamentally, an Employee Handbook **is** a **policy document** that serves several important purposes, including:
 - Give notice of terms of employment
 - Clarify and give notice of expectations and responsibilities
 - Promote legal compliance and limit exposure to liability
 - Establish routine personnel procedures
 - Articulate values/promote trust
 - Promote consistency over time
 - Provide a framework for evaluation and skill development
- ▶ Fundamentally, an Employee Handbook **is not** an employment contract or a labor agreement.
- ▶ A significant distinction between a contract and a policy/handbook is that the school district generally has discretion to modify its policies/handbooks (at least prospectively) based on unilateral decisions.

Unemployment Compensation

School Year Employees and Unemployment Compensation

DWD: “Teachers and other employees of educational institutions generally **do not** qualify for UI benefits during scheduled breaks in the school year **when** they have a contract or reasonable assurance of having a job after the breaks.

...

Reasonable assurance is a written, implied or verbal agreement that you will be performing services after the break period ends similar to the services performed in the period prior to the break. Although reasonable assurance may not be an actual contract or a guarantee of employment after the break period ends, the employer does need to notify you of their intent to utilize your services after the break period.”

See [DWD - What Teachers and Other School Year Employees Should Know about Unemployment Benefits - October 2017](#)



Evaluation Procedures

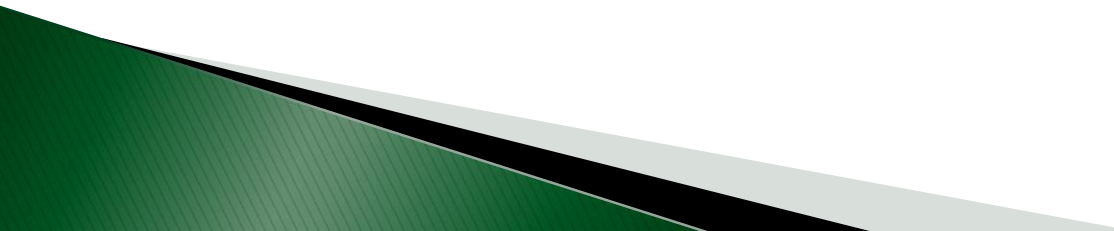


Evaluation Procedures

- ▶ Determined by:
 - Statutory requirements (certified staff), Employee Handbooks, Board Policy and Individual Contracts
 - No statutory requirement for support staff

Employee Evaluation – Administration's Role

Administration's Role

- Establish administrative rules as may be necessary to carry out employee evaluations.
 - Evaluate employees and provide follow-up as per board policy and established procedures.
 - Provide assurances to the board that the employee evaluation policies/procedures have been carried out.
 - Comply with legal requirements.
- 

Leave Rights

Sources of Employee Leave Rights

- ▶ Employee leave rights are the result of a combination of Wisconsin and Federal law and employer policy and handbook decisions:
 - Wisconsin FMLA and Federal FMLA
 - Americans with Disabilities Act and Wisconsin Fair Employment Act.
 - Pregnancy Discrimination Act and other discrimination laws.
 - Wisconsin Workers' Compensation.

What Are Employer's Obligations When Multiple Laws Apply?

- ▶ Family or medical leave may be covered by Wisconsin law, Federal law or both laws:
 - When an employee has leave rights under both Wisconsin and Federal law, he or she is entitled to the leave provided under the more generous law.
 - When an employee is covered by Federal but not Wisconsin law, ignore Wisconsin FMLA when determining employee leave rights, and vice versa.
 - Employees may also have rights under ADA, PDA, Workers' Compensation law, etc.

Wisconsin and Federal FMLA

- ▶ Is district covered by FMLA?
- ▶ Is employee covered by FMLA?
- ▶ Does employee have right to leave under FMLA?
- ▶ Has the employee used up his or her leave rights under the FMLA?
- ▶ Does the employee have a serious health condition?



FAMILY
AND
MEDICAL
LEAVE
ACT

Wisconsin and Federal FMLA

- ▶ Should employee be asked to have doctor certify that the employee has a serious health condition?
- ▶ Has employee requested FMLA leave and has employee given proper notice?
- ▶ Is the employee taking leave in non-continuous increments?
- ▶ What benefits are due to the employee during the leave?
- ▶ Does the leave need to be coordinated with paid and unpaid leave offered by the district by policy or handbook?



Which Employers are Covered by FMLA?

▶ WI FMLA:

- “**Employer**” means a person engaging in any activity, enterprise or business in this state employing at least 50 individuals on a permanent basis.
- “Employer” includes state and local governments. [WIS. STAT. § 103.10\(1\)\(c\).](#)
 - A person . . . shall be deemed to be "employing at least 50 individuals on a permanent basis" . . . if, during at least 6 of the preceding 12 calendar months, with partial months to count as full months, the employer . . . actually treated at least 50 individuals as being permanent employees . . . [WIS. ADMIN. CODE § DWD 225.01\(2\).](#)

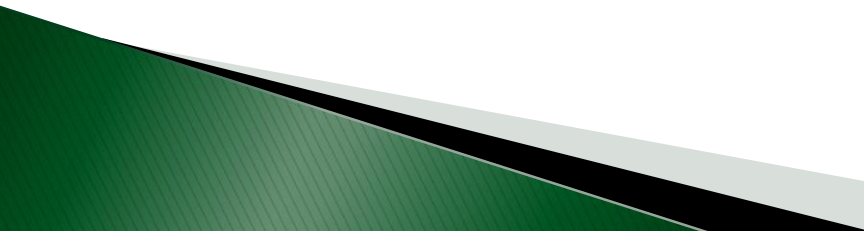
Which Employers are Covered by FMLA?

▶ Federal FMLA:

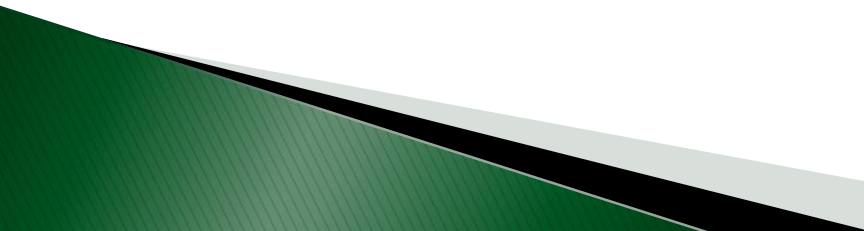
- **Definition of employer:** All public school districts and other public agencies are covered by the FMLA. Private employers with 50 or more employees are also covered. [29 C.F.R. § 825.104.](#)
- Note definition of “eligible employees” below. While all schools are covered by the FMLA, employees of schools employing fewer than 50 employees at work sites within 75 miles of the work site in question are not eligible for benefits under the FMLA. [29 C.F.R. § 825.108.](#)



Other Laws Apply to Small Employers

- ▶ The ADA applies to employers with 15 or more employees.
 - ▶ Most federal employment discrimination laws apply to employers with 15 or more employees.
 - ▶ The Wisconsin Fair Employment Act applies to all employers with one or more employee.
 - ▶ All school districts and other local governments are covered by the Wisconsin Workers' Compensation law.
- 

Other Laws Apply to Employees With No FMLA Rights

- ▶ The ADA and other state and federal discrimination laws and workers' compensation may apply to employees who work too few hours to be covered by FMLA.
 - ▶ The ADA and other state and federal discrimination laws and workers' compensation may apply to employees who have exhausted their FMLA leave rights.
- 

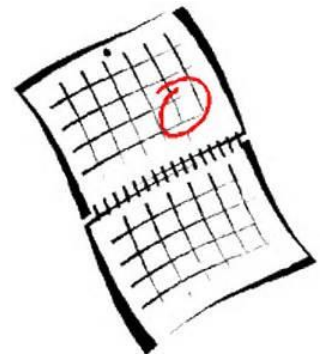
Which Employees Have Rights to FMLA Leave?

- ▶ WI FMLA:
- ▶ Eligibility requirements. In order to be eligible for WFMLA benefits, an employee must . . .
 - work for a covered employer;
 - have been employed by the same employer for more than 52 consecutive weeks; and
 - have worked for the employer for at least 1,000 hours (including paid leave) during the preceding 52-week period. [WIS. STAT. § 103.10\(2\)\(c\).](#)

Which Employees Have Rights to FMLA Leave?

▶ WI FMLA:

- **Definition of 52 weeks of work:** A person is deemed to have been employed by the same employer for more than 52 consecutive weeks if the person has actually been treated by the employer, according to usual record keeping practices required by state law, to be an employee for each of those 52 weeks, irrespective of the number of hours worked and notwithstanding an employee's paid or unpaid leave or layoff status.
- [WIS. ADMIN. CODE § DWD 225.01\(3\).](#)



Which Employees Have Rights to FMLA Leave?

▶ WI FMLA:

- **Definition of 1,000 hours of work:** A person is deemed to have worked 1,000 hours during the preceding 52-week period if the sum of the hours actually worked and the hours for which the employee received paid leave under the employer's employment policy is at least 1,000 hours. [WIS. ADMIN. CODE § DWD 225.01\(4\)](#).

Which Employees Have Rights to FMLA Leave?

- ▶ Federal FMLA. Employees must meet the following requirements:
 - work for a covered employer employing 50 or more employees at work sites within 75 miles of the worksite of the employee;
 - have worked for at least 12 months for the employer; and
 - have worked at least 1,250 hours during the preceding 12 months. [29 C.F.R. § 825.110](#), [29 C.F.R. § 825.600](#).

Which Employees Have Rights to FMLA Leave?

- ▶ Federal FMLA:
 - **Definition of 12 months of work:** The 12 months of work may be intermittent. If an employee's employment is intermittent, 52 weeks of work is deemed to equal 12 months. An employee earns a week of work if the employee is maintained on the payroll for any part of the week, including paid or unpaid leaves.
 - [29 C.F.R. § 825.110\(b\)](#).

Which Employees Have Rights to FMLA Leave?

- ▶ Federal FMLA:
 - Definition of 1,250 hours of work: The 1,250 hours of work is determined according to the principles established under the Fair Labor Standards Act. [29 C.F.R. § 825.110\(c\)](#). The 1,250 hours must have been worked during the 12-month period ending with the date of commencement of a leave under the act.

Which Employees Have Rights to FMLA Leave?

▶ Federal FMLA:

- If the employer is exempt from keeping records of hours under the FLSA (bona fide executive, administrative or professional employees), the burden of proof is on the employer to show that the employee did not work the requisite number of hours.
 - WI FMLA: Employer likely would have burden to show that employee exempt from hours recordkeeping did not work 1,000 in last year.
- Full time teachers of elementary or secondary schools are deemed by law to meet the 1,250 hours test.

Eligible Employee Leave Entitlements

▶ WI FMLA:

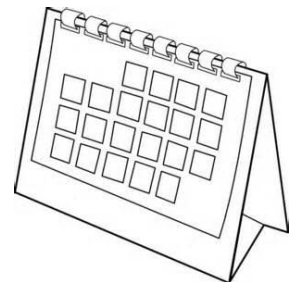
- Six weeks of leave for the birth of the employee's natural child, if the leave begins within 16 weeks of the child's birth.
- Six weeks of leave for the placement of a child with the employee for adoption or as a precondition to adoption, but not both, if the leave begins within 16 weeks of the child's placement.
- In a 12-month period no employee may take more than 6 weeks of family leave for birth or adoption.
- [WIS. STAT. § 103.10\(3\)](#)

Eligible Employee Leave Entitlements

▶ WI FMLA:

- Two weeks of leave in a 12-month period to care for the employee's child, spouse, domestic partner, or parent, if the child, spouse, domestic partner, or parent has a serious health condition. [WIS. STAT. § 103.10\(3\)](#)
- Two weeks of leave in a 12-month period for an employee who has a serious health condition which makes the employee unable to perform his or her employment duties may take medical leave for the period during which he or she is unable to perform those duties. [WIS. STAT. § 103.10\(4\)](#)

◦



Eligible Employee Leave Entitlements

- ▶ WI FMLA, what is a 12-month period:
 - For purposes of accounting for leave allowed under the state law, the 12-month period begins midnight on January 1 and ends at midnight on December 31 of each year. [WIS. ADMIN. CODE § DWD 225.01\(1\)\(m\).](#)

Eligible Employee Leave Entitlements

- ▶ Employees may take leave under the Federal FMLA for the following:
 - The birth, adoption or placement in foster care of a child;
 - to care for a son, daughter, spouse or parent with a serious health condition;
 - for the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job;



Eligible Employee Leave Entitlements

- ▶ Employees may take leave under the Federal FMLA for the following:
 - for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status); and
 - to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered service member. [29 C.F.R. § 825.112](#)

Eligible Employee Leave Entitlements

- ▶ Federal FMLA:
 - 12 weeks of leave in a 12 month period for any combination of leave for:
 - The birth or adoption of a child.
 - The serious health condition of the employee, parent, spouse or child.
 - Certain “qualifying exigencies” for employees whose family members are in the military.
 - Up to 26 weeks in a 12 month period of “military caregiver leave.” All FMLA leave entitlement is limited to a combined total of 26 weeks. [29 C.F.R. § 825.200](#)

Eligible Employee Leave Entitlements

- ▶ Employees with a serious health condition which is also a disability under the ADA who have exhausted their rights under Wisconsin or Federal FMLA may have a right to an unpaid leave of absence as an accommodation of their disability.
- ▶ Underneath the Americans with Disabilities Act, the Act forbids discrimination against a “qualified individual on the basis of disability.” Id. § 12112(a).

Eligible Employee Leave Entitlements

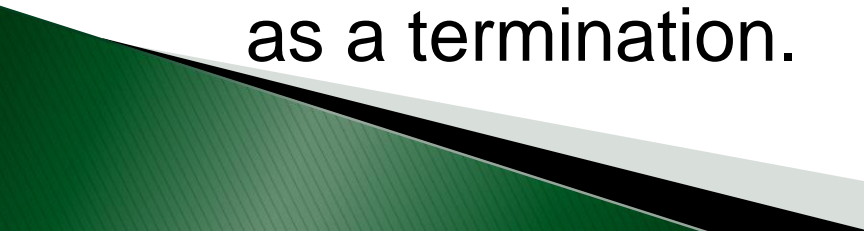
- ▶ A “qualified individual” with a disability is a person who, “with or without reasonable accommodation, **can perform the essential functions of the employment position.**” Id. § 12111(8).
- ▶ So defined, the term “reasonable accommodation” is expressly limited to those measures that will enable the employee to work.

Eligible Employee Leave Entitlements

- ▶ In Severson v. Heartland, 7th Circuit, September 20 2017 the court held that "an employee who needs long-term medical leave cannot work and thus is not a "qualified individual" under the ADA. *Byrne v. Avon Prods., Inc., 328 F.3d 379, 381 (7th Cir. 2003).* With support from the EEOC, *Severson* urges us to retreat from or curtail our decision in *Byrne*. We decline to do so. ***Byrne is sound and we reaffirm it: A multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA.***"

Layoff

Layoff and Reduction in Force

- ▶ Support staff
 - Follow district policies and/or handbooks.
 - COBRA Notification.
 - If there is no policy or handbook layoff procedure, support staff may be laid off at any time for any non-discriminatory reason.
 - No recall rights – layoff is essentially the same as a termination.
- 

Hours of Work

Hours of Work

- ▶ Support staff
 - Follow district policies and/or handbooks
 - Fair Labor Standards Act
 - Wisconsin Hours of Work and Overtime – Wis. Admin. Code DWD 274



Hours of Work

▶ Support staff

- Wisconsin Hours of Work and Overtime – [Wis. Admin. Code DWD 274](#)
- For employees of any age, if the employer provides breaks of less than 30 consecutive minutes in duration, the break time should be counted as work time.

Hours of Work

- Wisconsin law does not require that employers provide brief rest periods, coffee breaks, or meal periods to adult employees (*other than for teachers where there is a requirement for a duty free lunch period – [Wis. Stats. 118.235](#)*), although the Department recommends that employers do so.
- Employers are encouraged, but not required, to provide breaks of at least 30 minutes in duration at times reasonably close to the usual meal period. Such matters are to be determined directly between the employer and the employee.

Hours of Work

- ▶ Support staff - Wisconsin Hours of Work and Overtime – [Wis. Admin. Code DWD 274](#)
 - Employers must pay employees for "on duty" meal periods. An "on duty" meal period is one where the worker is not provided at least 30 consecutive minutes free from work, or where the worker is not free to leave the employer's premises.
 - Employers may not deduct from a worker's wages for authorized breaks of less than 30 consecutive minutes.

Exit Interviews

Employee Exit Interviews

- ▶ Proactive means of communication/feedback:
 - Conduct **employee exit interviews** – exit interviews involve a one-on-one discussion with departing employees, either in person or by telephone.
 - Exit interviews are personal opportunities in which the school district can thank departing employees for their contributions and wish them well on their future endeavors.
 - Exit interviews also provide an opportunity to discern the honest reasons for an employee's departure, which can provide a district with valuable data upon which to base future staff retention efforts.

Employee Exit Surveys

- ▶ Proactive means of communication/feedback (cont.):
 - Conduct **employee exit surveys** – Exit surveys, on the other hand, consist of asking departing employees to fill out either an online or paper questionnaire.
 - Like exit interviews, exit surveys also provide an opportunity for a district to discern the honest reason(s) for an employee's departure, which can provide a district with valuable data upon which to base future staff retention efforts.
 - The disadvantages of exit surveys are that response rates are typically lower than response rates for exit interviews, and the data will not be as rich because the district may not have the opportunity to ask follow-up questions.

Presenter Bio

WASB Legal and Policy Services staff counsel provide representation to school districts in Wisconsin concerning labor & employment, human resources, policy development, and school law matters.

Scott has been working in the area of school law and human resources since 2004. During that time, he has served as WASB Legal and Policy Services staff counsel as well as Human Resources Director and In-House Legal Counsel for school districts in Wisconsin and Iowa.

Scott graduated from the University of Wisconsin Law School and received his undergraduate degree in finance from Wartburg College. Scott can be contacted at:

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