

Wisconsin Fair Employment Act

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Introduction

Sec. 111.31 et seq., Wis. Stats.

Parallel to the ADA

Wisconsin law, like federal law, prohibits employment discrimination based on disability. Disability protections are part of the Wisconsin Fair Employment Act (WFEA). The WFEA, like the Americans with Disabilities Act (ADA), prohibits discrimination based on disability in all aspects of the employment relationship including hiring, firing, and terms and conditions of employment. Although the two laws are similar there are many differences, some of which are significant.

Who Does the Wisconsin Fair Employment Act Apply To?

Applies to more than disability

WFEA covers employers with one or more employees. It also applies to the activities of labor organizations. It applies to public and private employers including the state and local governments, the legislature and the courts. Unlike the ADA which applies only to people who meet the definition of disability, the WFEA covers a number of protected classes, i.e., it prohibits discrimination based on sex, race, marital status, sexual orientation, age over 40, creed, color and national origin.

Definition of disability

Under the WFEA, “individual with a disability” is defined as an individual who has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work. The first prong involving an “impairment which makes achievement unusually difficult” is similar to the “substantially impairs one or more major life activities” criterion under the ADA. The second prong “limits the capacity to work” refers to the particular job in question.

Sec. 111.32 (8), Wis. Stats.

Additionally, the WFEA protects individuals who have a record of such an impairment or are perceived as having such an impairment. Unlike the ADA, the WFEA does not provide protections based on association with an individual with a disability.

What Actions are Prohibited Under WFEA?

Sec. 111.322, Wis. Stats.

The WFEA generally prohibits refusing to hire, employ, admit or license any individual or barring or terminating from employment or labor organization membership any individual because of his/her disability. Additionally, it prohibits discrimination against any individual in promotion, compensation, or terms and conditions of employment or labor organization membership because of a disability. It also prohibits retaliation against an individual for asserting his/her

rights under the Act, assisting another person in protecting his/her rights under the Act, or for opposing discriminatory practices.

Furthermore, the statute prohibits advertising for or having application forms that imply or express a limitation or discrimination on the basis of disability. This also limits inquiries that can be made as part of a hiring process.



If you believe you may have been discriminated against in the hiring process or on the job, you should save and/or make an accurate record of all relevant events and paperwork related to the possible discrimination. This could prove to be decisive in determining the outcome of your case.

Sec. 111.34, Wis. Stats.

The WFEA includes specific provisions in relation to disability. Employment discrimination includes contributing a lesser amount to the fringe benefits of a person with a disability, including life and disability insurance coverage. It also includes refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

Lack of definitions

Neither "hardship" nor accommodation is defined in the statute. Case law, however, has held that accommodation must be broadly interpreted to resolve the problem it was designed to address and be liberally interpreted to bring about the purposes of the act.

Additionally, the statute says it is not discrimination because of disability to refuse to hire, employ, terminate, etc. if the disability is reasonably related to the individual's inability to adequately undertake the job-related responsibilities of the individual's employment, membership or licensure. This is to be determined by considering the present and future safety of the individual, his/her co-workers and the general public if applicable. This determination must be made on a case by case basis and not by a general rule. The employer must show a reasonable probability that the individual is or would be unable to safely or efficiently perform the duties of the job.

Reasonable probability standard

Employers are allowed even greater leeway in this regard if the employment or licensure involves a special duty of care to the general public such as common carriers and emergency personnel. The standard that applies depends not on the level of the individual's disability but on the nature of the work. The employer in these situations need only show a reasonable probability of harm. An example of this can be found in *Willett v. Delco*, LIRC (1/17/90) which said "The reasonable probability standard is applicable for the duties associated with a deaf person driving tuggers and scooters in a manufacturing facility, except for those duties involving the

transportation of toxic waste for which the reasonably related standard applies.” These provisions put a much lower burden on the employer than the more stringent “direct threat” defenses of the ADA.

What Process is Followed if a Discrimination Complaint is Made?

**State of Wisconsin
Equal Rights Division
608-266-6860
Time lines**

If you believe you have been discriminated against in violation of the WFEA, you can contact the State of Wisconsin Equal Rights Division and request a discrimination complaint form. You must file this form with them within 300 days of the events giving rise to your claim. Your signed and completed form will in turn be sent to the employer for a response within ten days.

Investigation process

Like the ADA related Equal Employment Opportunity Commission (EEOC) procedures, your complaint will be assigned to an investigator and will automatically be cross filed with the other agency (in this case the EEOC). It is likely that the investigator will share the employer’s response with you and ask you to respond. You may be asked to identify witnesses who support your position and provide documents you may have that do likewise. This back and forth with information may happen more than once and the entire investigation may take months to complete. In addition, you may be asked what you would be willing to accept to resolve your complaint. The investigator may attempt to resolve your complaint without making a decision on its merits. If the investigator does not settle your case, s/he will issue an initial determination. (*See ADA: Title 1 - Employment Discrimination chapter, pg. 317.*)

Need for an attorney

If the initial determination is in your favor, there will be a finding made that there is probable cause to believe you were discriminated against and the matter will be scheduled for a hearing. If you have not found an attorney to represent you before this point, it is advisable to do so as soon as you get the initial determination. Although you are not required to have an attorney present there are several complicated aspects to the process including discovery, the production of documents and witnesses, as well as the hearing itself which can be difficult for a lay person to handle on his or her own.

The hearings are held before an administrative law judge who only hears discrimination cases. The hearing includes sworn testimony and follows the rules of evidence. After the hearing there will be the opportunity to file legal briefs and eventually a written decision will follow. Either party can appeal this decision to the Labor and Industry Review Commission which will review the matter on the record (no new testimony will be taken or documents received).

What Remedies are Available?

The WFEA provides for remedies that include recovery of lost wages including back pay and sometimes front pay, out-of-pocket expenses such as benefits you had to replace or job hunting expenses and costs, and attorney fees. Unlike the ADA you cannot collect damages for pain and suffering, nor can you collect punitive damages.