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## **Wisconsin Supreme Court Decision Provides Opportunities to Reduce Future Unemployment Compensation Costs**

On June 26, 2018, the *Wisconsin Supreme Court* issued its decision in *Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission, et al*, 2018 WI 77, in which it held that the plain language of the applicable statute allows an employer to adopt its own absenteeism policy, allowing for a violation of which will result in a discharge for misconduct for unemployment compensation purposes. From an employer's perspective, the Court's decision is significant in a number of ways.

1. The benefit of having an up-to-date employee handbook with a clear absenteeism/tardiness policy can't be over-emphasized.
2. Because Wis. Stat. §108.04(5)(e) only allows reliance on the employer's policy if the employee "has acknowledged receipt with his or her signature," it is critical to have employees sign-off on the receipt of the employee handbook, including any periodic revisions.
3. Because many employees are terminated for violating their employer's attendance policies, this decision should help curtail some of the costs associated with unemployment compensation.

Here's the background on this decision and why it matters:

In 2013, a number of revisions were made to Wisconsin's unemployment compensation law clarifying the definition of a misconduct discharge, which makes an employee ineligible for unemployment compensation benefits. As revised, Sec. 108.04(5)(e) of the Wisconsin Statutes provides that, among other prohibited behavior, misconduct includes:

Absenteeism by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination, unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature, or excessive tardiness by an employee in violation of a policy of the employer that has been communicated to the employee, if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism or tardiness.

The revised statute allows an employer to define absenteeism and tardiness by policy. If the policy is provided to the employee and the employee acknowledges receipt of the policy with his or her signature, then the employer's definition of absenteeism/tardiness will be applied for purposes of determining whether the employee was discharged for misconduct, and, in turn, his or her eligibility for unemployment compensation benefits.

The language of the statute seems clear enough. Yet, in a case involving a probationary employee who was discharged for violating her employer's absenteeism policy, the Wisconsin Labor and Industry Review Commission (LIRC) held the employee was not discharged for misconduct, because the employer's policy was stricter than the statutory policy of 2 occasions of absenteeism within the 120-day period before termination. As a result, LIRC held that the employee was entitled to unemployment compensation benefits. The case was appealed, and eventually reached the Wisconsin Supreme Court.

On June 26, 2018, the Court issued its decision in *Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission, et al*, 2018 WI 77, in which it held that the plain language of the statute allows an employer to adopt its own absenteeism policy, violation of which will result in a discharge for misconduct for unemployment compensation purposes.

LIRC had argued to the Court that an employee is not disqualified from obtaining unemployment compensation benefits when the employee is terminated for violating an employer's absenteeism policy if that policy is more restrictive than the "2 in 120" day standard provided by the statute.

However, the Court, noting that "The statute is written in ordinary English and creates a simple framework," used several canons of statutory interpretation to determine as follows:

In contrast to LIRC's interpretation of the statute, we conclude that the text of Wis. Stat. § 108.04(5)(e) plainly allows an employer to adopt its own attendance (or absenteeism) policy that differs from the policy set forth in § 108.04(5)(e), and termination for the violation of the employer's policy will result in disqualification from receiving unemployment compensation benefits even if the employer's policy is more restrictive than the policy set forth in the statute.

We recommend that Wisconsin employers review and revise their attendance policies to take advantage of the Wisconsin Supreme Court's decision. If you would like assistance in this regard, or have any questions related to the Court's decision, please contact Dan Vliet at [dvliet@buelowvetter.com](mailto:dvliet@buelowvetter.com) or 262-364-0259, Brian Waterman at [bwaterman@buelowvetter.com](mailto:bwaterman@buelowvetter.com) or 262-364-0257, or your Buelow Vetter attorney.