

I. Criminal Liability -- Private Interest In Public Contracts -- Wis. Stat. § 946.13

A. Offenses Under the Statute.

1. Subsection (1)(a) of the statute is violated when a public officer or public employee, in his or her 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. *See Wis. Stat. § 946.13(1)(a).*
2. Subsection (1)(b) is violated when a public officer or public employee, in his or her capacity as an officer or employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest, director or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part. *See Wis. Stat. § 946.13(1)(b).*
 - a. The restriction is not limited to those with final authority to execute a contract. It may extend to an administrative staff member who recommends that the governmental body contract with a corporation in which he or she is a majority shareholder.
 - b. It is not clear whether a public officer or employee can avoid liability by remaining "totally aloof" from the contracting process.
 - i. The Attorney General has suggested that there is no violation of the statute by a public officer if, in his or her public capacity, the officer refrains from voting or debating a contract or any matter relating to the contract and if, in his or her private capacity, the officer does not personally or by agent negotiate or enter into the contract. 52 Op. Att'y Gen. 367, 370 (1963).
 - ii. However, the Attorney General has also noted that it may not be possible to avoid liability under subsection (a) by merely abstaining from voting and suggested that a public officer with a financial interest should avoid making proposals in areas in which he or she is financially interested. 60 Op. Att'y Gen. 98, 100-101 (1971). *See also* 76 Op. Att'y Gen. 178, 179 (1987) in which the Attorney General advised county supervisors that they could avoid

violation of subsection (b) by abstaining from voting on the vouchers related to their respective businesses.

- iii. Where the spouse of a school district business manager or other administrative official is employed by the district as professional, support or other staff, the business manager or other administrative official may not participate at all in negotiations for the collective bargaining agreement governing his or her spouse's unit. Such participation includes collecting and providing financial data to the bargaining team or giving advice and offering an opinion in one's official capacity in regard to a contract. *See Letter to Honorable Tim Weeden, (May 20, 1987).*
- c. Even if a public official or employee does not participate in the contracting process, he or she may be liable for taking any subsequent action on the contract. Such actions might include authorizing payment under the contract, negotiating disputes over contract terms, or inspecting the quality of materials or services under the contract.
- d. A public officer or employee does not violate the statute by reason of his or her holding not more than two (2%) percent of the outstanding capital stock of a corporate body involved in a contract with the state or political subdivision. *See Wis. Stat. § 946.13(5).*

B. Purpose of the Statute.

1. “The object of this statute is to prevent a public officer or employee from having private pecuniary interests which may influence him to exercise discretionary powers in his official capacity in a manner inconsistent with the interests of this public. It is derived from that rule of agency which prohibits an agent from serving two masters with opposing interests in the same transaction and the common-law rule which prohibits public officers from simultaneously holding incompatible offices.” *State v. Stoehr*, 134 Wis.2d 66, 80, 396 N.W.2d 177 (1986) (quoting Judiciary Committee Report on the Criminal Code, p. 179 (1953)).
2. The statute “is directed not at corruption, but at conduct presenting an opportunity for corruption.” *Stoehr*, 134 Wis.2d at 79. Because the judgment of a public officer or employee may be impaired when the office transacts governmental business in which he or she has a personal economic interest, the statute attempts to prevent public officers and employees from “succumbing to temptation by making it illegal for them to enter into relationships which are fraught with the danger that they will advance private interest rather than a public good.” *Id.*

C. Strict Liability.

1. A strict liability crime does not require proof of criminal intent. *Stoehr*, 134 Wis.2d at 75.
2. The state does not have to prove that a public officer or employee intended to violate, or knew he or she was violating the law in order to prove a violation of the statute. *Stoehr*, 134 Wis.2d at 82.

D. Exceptions.

The statute does not apply to conduct related to certain types of contracts, including:

1. 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 in any year. *See* Wis. Stat. § 946.13(2)(a).
2. Contracts involving the deposit of public funds in public depositories. *See* Wis. Stat. § 946.13(2)(b).
3. Contracts for publication of legal notices required to be published, provided such notices are published at a rate not higher than that prescribed by law. *See* Wis. Stat. § 946.13(2)(d).

E. Defenses.

1. Because this is a strict liability statute, good faith does not generally operate as a defense. *Stoehr*, 134 Wis.2d 66.
2. The Wisconsin Supreme Court has held that a public official could rely on the defense that he or she relied on the advice of the attorney for the governmental entity. However, the Court limited its opinion to “the good faith reliance upon the legal opinion of a government officer whose statutorily created duties include the rendering of legal opinions as to actions of specific individuals or groups. In addition, the action of any individual or group relying on such opinion would have to be taken in good faith, open and unconcealed.” *State v. Davis*, 63 Wis.2d 75, 82, 216 N.W.2d 31 (1974).

F. Penalties.

1. Effect on Contract.

- a. A contract entered into in violation of this statute is void and the state or the political subdivision on whose behalf the contract was made incurs no liability for the contract. Wis. Stat. § 946.13(3).
- b. This language has been interpreted as giving the public body the discretion of voiding the contract or requiring its enforcement. *Washington County v. Froehlich Mercantile Co.*, 198 Wis. 56, 223 N.W. 575 (1929).
- c. A contract is not void, however, under this subsection of the statute if the contract creates a public debt. *See* Wis. Stat. § 946.13(6).

2. Criminal Penalties

- a. Any public officer or public employee who violates the statute is guilty of a Class I felony. Wis. Stat. § 946.13(1).
- b. A Class I felony is punishable by a fine not to exceed \$10,000 or imprisonment not to exceed three years and six months or both. Wis. Stat. §§ 946.13(1), 939.50(3)(i).

3. Personal Liability.

- a. If the public body declares the contract void, other parties to the contract may attempt to hold the interested public officer or employee personally liable for repayment of any money obtained under the void contract. *Reetz v. Kitch*, 230 Wis. 1, 283 N.W. 348 (1939).
- b. However, if other public officers or employees have no knowledge of the conflict of interest, such officers or employees should not be subject to liability. *Id.*
- c. If a public officer or employee is found guilty under Wis. Stat. § 946.13 and is ordered to repay the public funds, he or she will probably not be able to rely on Wis. Stat. § 895.46, which requires that municipalities pay judgments taken against their officers and employees for actions within their scope of employment.

II. Misconduct in Public Office / Bribery of Public Officers and Employees

A. Misconduct in Public Office – Wis. Stat. § 946.12.

1. The statute provides, in pertinent part, that a public officer or public employee who does any of the following is guilty of a Class I felony:
 - a. 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. Wis. Stat. § 946.12(2).
 - b. 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. Wis. Stat. § 946.12(3).
 - c. 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. Wis. Stat. § 946.12(5).
2. The statute proscribes conduct that is sometimes treated under the separate headings of malfeasance, misfeasance, nonfeasance, extortion and oppression. *State v. Schmit*, 115 Wis.2d 657, 661, 340 Wis. 2d 752 (Ct. App. 1983).
3. Any public officer who violates the statute is guilty of a Class I felony, which is punishable by a fine not to exceed \$10,000 or imprisonment not to exceed three years and six months or both. *See* Wis. Stat. §§ 946.12, 939.50(3)(i).

B. Bribery of Public Officers and Employees–Wis. Stat. § 946.10(2).

1. The statute provides, in pertinent part, that any public officer or public employee who does any of the following is guilty of a Class H felony:

Any public officer or public employee who directly or indirectly accepts or offers to accept any property or any personal advantage, which the officer or employee is not authorized to receive, pursuant to an understanding that the officer or employee will act in a certain manner in relation to any matter which by law is pending or might come

before the officer or employee in the officer's or employee's capacity as such officer or employee or that the officer or employee will do or omit to do any act in violation of the officer's or employee's lawful duty.

2. The crime of bribery is not a strict liability offense, but rather one that requires criminal intent to be proved. *State v. Alfonsi*, 33 Wis.2d 469, 476, 147 N.W.2d. 550 (1967).
3. Any public officer who violates the statute is guilty of a Class H felony, which is punishable by a fine not to exceed \$10,000 or imprisonment not to exceed six years, or both. Wis. Stat. §§ 946.10, 939.50(3)(h).

III. Code Of Ethics – Wis. Stat. § 19.59¹

A. Who is Covered by the Statute?

1. Wis. Stat. § 19.59 applies to all political subdivisions and special purpose districts of the state, as well as instrumentalities and corporations of the political subdivisions and special purpose districts.
2. Within those local units of government, the statute covers “local public offices” which is defined to include the following:
 - a. An elected office of a local government unit.
 - b. An appointed office or position of a local government 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.
 - c. An appointed office or position which is filled by the governing body or the executive/administrative head of the government unit and in which the person 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. *See* Wis. Stat. § 19.42(7w).

¹Please note when referencing this outline that 2007 Wisconsin Act 1 (Act 1) merged the Wisconsin Ethics Board and the Elections Board to form the Government Accountability Board (GAB). Since March 2008, the GAB has been holding periodic public hearings concerning the reaffirmation of the opinions and guidance previously issued by the Ethics Board. The GAB has decided and is continuing to decide whether to reaffirm, withdraw or modify prior opinions, and whether to reaffirm, withdraw or revise previously issued guidance.

B. Prohibitions.

In general, the Code of Ethics contains two types of restrictions.

1. A local public official may not profit personally from holding his or her public office or position, apart from the receipt of salary and expenses to which the official is entitled.

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.” Wis. Stat. § 19.59(1)(a) (emphasis added).

i. Substantial Value

The phrase “substantial value” has been interpreted to mean anything of more than nominal, token, or inconsequential value in light of the totality of circumstances. 1993 Wis. Eth. Bd. 8 (reviewed and reaffirmed by the GAB on January 15, 2009).

(1) With respect to whether an item of substantial value is obtained for the benefit of the local official, the Ethics Board had long recognized that receipt of an item may result in both a public as well as a private benefit. The test the Ethics Board developed, which the Government Accountability Board (GAB) has subsequently adopted, is whether the benefit conveyed is primarily a private or a public benefit. If the benefit is primarily public, the statute is not violated.

(2) For example, the GAB has concluded that an employee appreciation dinner hosted by a county board of supervisors had primarily a public benefit. The GAB concluded that the dinner, which cost approximately \$15 per meal, was an item of substantial value. However, because the primary purpose of the dinner was to enhance morale, boost retention and motivate the work force, the benefit conveyed was primarily public. The GAB held that the board of supervisors could host the meal and county employees could accept the meal without running afoul of the code of ethics. *See* 2008 GAB 03.

ii. Immediate Family

The term “immediate family” is defined to include: (1) an individual’s spouse and (2) an individual’s relative by marriage, lineal descent, or adoption who receives, directly or indirectly, more than one-half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one-half of his or her support. *See Wis. Stat. § 19.42(7).*

iii. Organization with which the Public Official is Associated.

The term “associated” when used with reference to an organization, includes “any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.” *Wis. Stat. § 19.42(2).* A person is not associated with an organization merely because the person is a member or employee of an organization or business.

- 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.” *Wis. Stat. § 19.59(1)(b)* (emphasis added).

i. Anything of Value.

The phrase “anything of value” means “any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment” *Wis. Stat. § 19.42(1).*

ii. Influencing Individual’s Judgment.

The Ethics Board, when interpreting a parallel statute applicable to state officials, *Wis. Stat. § 19.45(3)*, interpreted “expected to influence” in the following

manner: “It would be unreasonable to expect a gift of not more than \$25 to influence an individual’s judgment. It would be unreasonable to expect a favor or service from an individual or from an organization without any special interest in the actions of a public body to influence an official affiliated with that body.”

Generally speaking, the GAB suggests that all local government officials, before accepting an item or service, ask whether it would be reasonable for someone to believe that the item or service is likely to influence the official’s judgment or be perceived as an award for past action. If the answer is yes, the item or service may not be accepted.

iii. Wisconsin Ethics Board Guidance (see attached)

The Ethics Board issued guidance documents which are designed to help local public officials identify when certain benefits are prohibited by law, including a guidance document (Eth 219) addressing when receipt of food, drink, favors, or services are prohibited by law.

iv. WASB State Education Convention Guidance

WASB plans to include in the November 2009 issue of *Wisconsin School News* a Legal Comment written by Lathrop & Clark LLP, regarding legal concerns raised when local public officials attend conventions.

The Legal Comment notes that, while attending a convention authorized by and on behalf of a municipality, including a school district, a local public official *may* accept meals, refreshments and the like without charge that are provided, sponsored, and/or sanctioned by the event organizer. However, school district officials must be cautious about accepting food, drinks and/or entertainment, without charge or at less than fair value, that are offered at social events sponsored by entities or organizations other than the event organizers when the entities or organizations may be current or prospective school district vendors.

2. A local public official may not participate in decisions in which he or she has a personal financial interest.

a. “No local public official may take any official action substantially affecting a matter in which the official or a member of his or her

immediate family or an organization with which he or she is associated has a substantial financial interest.” Wis. Stat. § 19.59(c)1. (emphasis added).

- i. The Code of Ethics does not define “substantial financial interest,” and fails to contain a safe harbor like the \$15,000 threshold contained in Wis. Stat. § 946.13(2)(a). Thus, unlike Wis. Stat. § 946.13, the possibility exists that financial interests in “matters” involving much less than \$15,000 may trigger application of the Code.
- ii. The Wisconsin Ethics Board indicated that a state official “should not, in an official capacity, participate in or perform any discretionary action with respect to the making, granting or imposition of an award, sanction, permit, license, contract, or offer of employment in which either ... the official has a private financial interest, direct or indirect, or ... a business or organization with which the official is associated has a substantial financial interest.”
- iii. The GAB has reaffirmed that participating, in any official capacity in discussion, contract negotiations, and votes on issues before a school board is taking official action. *See* 1997 Wis. Eth. Bd. 6 (reviewed and reaffirmed by the GAB on January 15, 2009).
 - (1) The Ethics Board held, and the GAB has reaffirmed, that a school board member whose spouse is employed as a teacher by the school district may not participate in negotiations, discussions or votes on the teacher’s contract, or any other union contract if it will affect the terms of the teachers’ contract in other than an inconsequential manner.
 - (2) The school board member may vote on the school district budget if the school board has already entered into a contract establishing teacher salaries, but may not vote on the budget if the budget will substantially affect teacher salaries or benefits. The school board member may also participate in decisions affecting class size, teaching hours and other general school policy decisions if the effect of the decision on the school board member’s spouse is not materially different from the effect on other teachers.

iv. A public official may act on a matter, despite being “interested” within the meaning of the Code, as long as: (1) the official’s action affects a whole class of similarly situated interests; (2) the official’s interest is insignificant compared to all affected interests in the class; and (3) the effect of the official’s action on his or her interest is neither significantly greater nor less than the effect upon the interests of other members of the class. 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 100 (1982).

b. “No local public official may use his or her office or position in any 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.” Wis. Stat. § 19.59(1)(c)2.

C. Request for Advisory Opinion.

1. Opinions from a municipal ethics board or legal counsel for the local governmental entity are available.

a. “Any individual, either personally or on behalf of an organization or governmental body, may request of a county or municipal ethics board, or, in the absence of a county or municipal ethics board, a county corporation counsel or attorney for a local governmental unit, an advisory opinion regarding the propriety of any matter to which the individual may become a party.” Wis. Stat. § 19.59(5)(a).

b. Advisory opinions and requests for opinions shall be made in writing. *Id.*

c. It is prima facie evidence of intent to comply with the code of ethics or any ordinance when an individual refers a matter to an attorney for a local governmental unit and abides by the advisory opinion, if the material facts are as stated in the opinion request. *Id.*

2. Opinions from the Government Accountability Board are available.

a. A county corporation counsel, an attorney for a local governmental unit, or a statewide association of local governmental units may request the GAB to issue an opinion concerning the interpretation of the code of ethics. Wis. Stat. § 19.59(6).

- b. The statutes do not authorize the GAB to issue an opinion to a local public official directly, only to the attorney for the local governmental unit.
- c. The GAB must review any request and may advise the person making the request. *See* Wis. Stat. § 19.59(6).

D. Penalty.

1. Any person who violates the code of ethics may be required to forfeit not more than \$1,000 for each violation. Wis. Stat. § 19.59(7). Intentional violations are penalized criminally by fines of \$100 to \$5,000, imprisonment for up to one year, or both. Wis. Stat. § 19.58(1).
2. Enforcement may be taken by action of the local district attorney or by the attorney general if the local district attorney refuses. Wis. Stat. § 19.59(8).

IV. Common Law Conflicts of Interest

A. Overview

Public officials and employees are also subject to conflict of interest restrictions developed under the common law (laws that are the result of court decisions, rather than by statute or rule).

B. Definition and Purpose

1. “The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth . . . that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests.” *Heffernen v. Green Bay*, 266 Wis. 534, 542, 64 N.W.2d 216 (1954).
2. The impact of this doctrine on a local governmental body is that, as a general rule, no public official may vote on any question (as well as any contract) in which he or she has a direct, personal, financial interest. *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879).
3. As 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 action in any manner other than in the best interests of the public. 58 Op. Att’y. Gen. 247 (1969).

C. Consequences.

When it is shown that a public official had a conflict of interest with regard to a matter upon which he or she voted, a court is likely to set aside the tainted vote and/or allow the governmental body to declare the action void altogether.

V. Incompatibility of Offices and Positions.

A. Definition and Purpose.

1. The doctrine of incompatibility prohibits one person from holding two offices which are incompatible in the sense that the two offices impose conflicting duties upon the holder, thereby making it impossible for the holder to discharge the duties of each office with undivided loyalty as public policy demands. Applicability does not rest upon the integrity of the individual office holder and his particular ability to balance conflicting duties, but rather upon a public policy determination which seeks to insure that there be the appearance as well as the actuality of impartiality and undivided loyalty. McQuillin, *Municipal Corporations* (3rd Ed.), § 12.67, pp. 269-271; 63A Am. Jur. 2d, § 78, p. 727.
2. Incompatibility is generally understood to mean a conflict or inconsistency in the function of two offices. Incompatibility is almost always found to exist where one office is subordinate to another or subject to its supervision or control. Two offices are incompatible when one has the power of appointment to or removal from the other, or when there are many potential conflicts of interest between the two (such as salary negotiations, supervision and control of duties, or obligations to the public to exercise independent judgment, e.g., where one office is responsible for auditing the accounts of the other office). The functions and duties of the offices are determinative of whether they are incompatible or not. 63A Am. Jur. 2d, § 78, p. 727; Rhyne, *The Law of Local Government Operations*, § 9.18, p. 155.
3. According to the Wisconsin Attorney General, “two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. 58 Op. Att’y Gen. 247 (1969).
4. The defense that the conflict in duties may never arise is irrelevant; as long as the statutory duties of the offices raise the possibility of a conflict, the doctrine applies. Nor is it pertinent that if a conflict should arise, the

incumbent may omit to perform one of the incompatible roles. The doctrine was designed to avoid the necessity for that choice. In choosing to perform the duties of one office to the exclusion of the other, the office holder cannot be said to have given undivided loyalty to each office. McQuillin, *Municipal Corporations* (3rd Ed.), § 12.67, p. 271; 63A Am. Jur. 2d § 78, p. 728; Rhyne, p. 155; *Otradovec v. City of Green Bay*, 118 Wis.2d 393, 397, 347 N.W.2d 614 (Ct. App. 1984).

5. A person cannot at the same time serve as both a school board member and a teacher, bus driver, or coach in that particular school district. The position of teacher, bus driver, or coach is subordinate to the control of the office of school board member; the office would have the power of appointment; removal or discipline over the position; and the public would have little faith in the individual's ability to discharge with fidelity and propriety the duties of both. Thus, two offices or an office and position are incompatible if one office is subordinate to the control of the second office.

B. Interpretation.

1. The incompatibility rule has been expanded to apply to public positions as well as offices, so that, for example, a person employed by a municipality as city assessor cannot contemporaneously hold the office of alderman. The trial court did not err in ordering the public official to choose between his elected office and his position as city assessor. *Otradovec*, 118 Wis.2d 393.
2. In *Martin v. Smith*, 239 Wis. 314 (1941), the court noted the common law doctrine of incompatibility of offices and the requirement that "if one holding a public office accepts another incompatible with the one which he holds, he thereby vacates the first office. *Id.*, citing *State ex rel. Nebraska Rep. State C. Com. v. Wait*, 138 N.W. 159 (Neb. 1912). Interestingly, in 1978 the Attorney General suggested that no Wisconsin court had decided that a person holding an incompatible office and position must vacate the first. Accordingly, he decided to agree with the North Dakota Supreme Court, which held that a teacher serving as a school board member in the same district could choose which position he wished to retain. 67 Op. Att'y. Gen. 177 (1978), citing *Tarpo v. Bowman Sch. Dist. No. 1*, 232 N.W.2d 67 (N.D. 1975).
3. Where substantial conflicts between the two offices or an officer and position are possible, a person cannot avoid incompatibility by abstaining from voting in those areas. The rule is designed to avoid a person having to make that decision. *Otradovec*, 118 Wis.2d 393.

VI. Sale of Goods and Services at Schools – Wis. Stat. § 118.12

- A. A school board may adopt written resolutions governing the sale and promotion of goods and services on school district property. The resolutions may prohibit, restrict or provide guidelines for such sales and promotions.
- B. No school district employee may receive for his or her personal benefit anything of value from any person other than his or her employing school district to sell, promote the sale of or act as an agent or solicitor for the sale of any goods or services to any public school pupil while on the property of his or her employing school district or at an activity of his or her employing school district.
- C. Any person violating this statute is subject to a forfeiture of not more than \$200 for each offense.

VII. Moonlighting – Wis. Stat. § 118.24(2)(b)

A. Definition:

- 1. Moonlighting: When an employee works at another job after the hours of his or her regular job.
- 2. No law specifically prohibits moonlighting by school district administrators or other district employees.

B. District Administrator:

- 1. Wis. Stat. §118.24(2)(b): The school district administrator shall not be a member of the school board and shall not engage in any pursuit which interferes with the proper discharge of his or her duties. These duties include those set forth under Wis. Stat. § 118.24, which include “general supervision and management of the professional work of the schools and the promotion of pupils.” *See* Wis. Stat. § 118.24(2)(a).
- 2. It is unclear when this prohibition might apply. However, where a school board feels its administrator’s moonlighting activities interfere with his or her duties as administrator, the board is likely to be able to rely upon Wis. Stat. §118.24(2)(b) to compel that the administrator cease the moonlighting activities.

C. Other District Employees:

- 1. Local governmental units, such as school districts may restrict their employees’ ability to “moonlight.” *Walsh v. Ward*, 991 F.2d 1344 (7th Cir. 1993) (“[T]he Constitution does not create a right to moonlighting; public agencies may insist on the full-time services of their employees.”)

2. Many Wisconsin attorneys general have viewed Wis. Stat. §118.12(1)(b) as a statute granting school boards the authority to restrict the moonlighting of school district employees. *See* 7 OAG 435 (1918); 26 OAG 27 (1938)

D. Moonlighting Policy

1. Wisconsin courts and Wisconsin statutes have not addressed moonlighting by school district employees or other public employees generally.
2. The United States Court of Appeals for the Fifth Circuit, located in Texas, held that a school district was not prevented from prohibiting all outside employment as long as the policy is applied uniformly. A school district may not single out a particular administrator or teacher for the imposition of restrictions which were not applied to others similarly situated. *Gosney v. Sonora Independent Sch. Dist.*, 603 F. 2d 522 (5th Cir. 1979).
3. In *Gosney*, the court held further that a school district could adopt a moonlighting policy that limited the type of outside employment. For example, a policy which permitted a certain amount or kind of outside employment, such as farming, but otherwise prohibited all employment outside of that or other clearly defined categories, is permissible. *Id.*
4. Where an employee has a second job that adversely affects the employee's attendance or work performance, or otherwise detrimentally affects the primary employer, disciplinary action up to discharge may be proper. Elkouri and Elkouri, *How Arbitration Works*, p. 1110 (6th ed. 2003).

VIII. Revocation Of License Based On Immoral Conduct – Wis. Stats. § 115.31.

- A. The state superintendent may revoke the license for certain public officials. In particular, such revocation may occur if the licensee is involved in “immoral conduct,” which includes ethical violations.
- B. Wis. Stat. § 115.31(2) provides that any license granted by the state superintendent may be revoked for incompetence or “immoral conduct” on the part of the licensee. “Immoral conduct” means any conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare, or education of any pupil. “Incompetence” is not defined by the statute.
- C. A school administrator must report to the state superintendent the name of any person employed by the educational agency and licensed by the state superintendent under certain circumstances, including if: (1) the person is dismissed or their contract is nonrenewed by the employer based on evidence that

the person engaged in immoral conduct or (2) the person resigns and the administrator has a reasonable suspicion that the resignation relates to the person having engaged in immoral conduct.

- D.** The superintendent must determine whether there is a “direct relationship” between the immoral conduct and the health, welfare, safety, or education of any pupil. In examining this issue, the superintendent should consider the following: (1) the offending individual’s beliefs; (2) the severity of the actions; and (3) the degree to which the actions interfere with the educational process.
- E.** If a superintendent intentionally fails to report a violation of this statute, that individual shall be fined not more than \$1,000 or imprisoned for not more than six months, or both. If the individual fails in good faith to report the violation, then that individual shall be immune from civil liability for such omission.
- F.** The Department of Public Instruction has the burden to prove by clear and convincing evidence that a nexus exists between a district employee’s immoral conduct and the health, welfare, safety or education of any pupil. A superintendent’s determination of whether an individual’s immoral conduct had a nexus to health, welfare, safety, or education of any pupil is entitled to deference by the courts.
- G.** If the superintendent is the subject of discipline under this statute, then the duty to report becomes the school board president’s duty. The report must be made within fifteen days after the administrator becomes aware of the charge, conviction, dismissal, nonrenewal, or resignation.

IX. Nepotism

- A.** Wis. Stat. § 111.345 specifically states that it is not employment discrimination because of marital status to prohibit an individual from directly supervising or being directly supervised by his or her spouse.
- B.** A policy prohibiting any person from serving on a school board if the person’s spouse, child, or parent is a district employee was held unconstitutional by a federal district court in Rhode Island. *Dwyer v. Conflict of Interest Comm’n*, 646 F. Supp. 707 (D.RI 1986).
- C.** Anti-nepotism rules and policies have been upheld by state and federal courts if they are found to be grounded upon a rational basis; i.e., the questions are (1) whether the rule or policy advances a legitimate governmental interest, and (2) whether the rule or policy is a reasonable means by which to advance that interest.
- D.** A resolution which provided that the school district would not employ the spouse of a board member (which resulted in the termination of a bus driver whose wife

was a member of the school board) is a mandatory subject of bargaining. The decision to adopt the anti-nepotism policy and the impact of the implementation of the policy are mandatory subjects. *Sch. Dist. of Drummond v. WERC*, 121 Wis.2d 126 (1984).

X. Sexual Favoritism

A. Definition

Sexual harassment is unwelcome sexual or gender-based behavior that occurs when one person has formal or informal power over the other or interferes with the employers work environment.

Title VII - 42 U.S.C. § 2000e-2(a)(1) and Wisconsin Fair Employment Act (WFEA) - Wis. Stat. §§ 111.32(13), 111.36(1)(b) and 111.36(3)

B. Types of Harassment

1. *Quid Pro Quo*: Implicit or explicit requests for sexual favors which may be used as a condition or basis for employment decisions or advancement.
2. *Hostile Work Environment*: Harassing behavior that has the purpose or effect of unreasonably interfering with a person's ability to work or which creates an intimidating, hostile, or offensive work environment.

C. Sexual Favoritism

1. Sexual favoritism claims are sometimes filed by employees who allege that they have been denied an employment opportunity because of the favoritism a supervisor has shown toward another employee with whom the supervisor is having a sexual relationship.
2. The California Supreme Court permitted two female prison employees to maintain a sexual harassment suit alleging that the prison warden created a hostile environment by giving unwarranted favoritism to his female lovers. The important feature of this case is that the plaintiffs have viable sexual harassment claims even though no one made a sexual advance to them or directed any harassment at them. *Miller v. Department of Corrections*, 36 Cal. 4th 446, 30 Cal. Rptr. 3d 797, 115 P.3d 77 (Cal. 2005).
3. The Equal Employment Opportunities Commission provided an in-depth discussion on this issue in *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*, No. N-915-048 (June 18, 1999). This policy document intends to provide guidance on the extent to which an employer should be held liable for discriminating against individuals who are qualified for but are denied an employment opportunity or benefit,

where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests.

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