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**Session 3**

**Employment Lawsuits &  
Remote Workers**

**Presented by:**

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## About the Presenters...

**Erica Reib** is a shareholder at O'Neil Cannon in Milwaukee, Wisconsin and leads its Labor and Employment Practice Group. She represents businesses in state and federal courts, administrative agencies, and arbitrations and mediations on matters including employment discrimination, wage and hour, and restrictive covenants. Erica also assists clients with drafting, enforcing, and defending employment agreements, restrictive covenants, and employee handbooks. She provides clients with day-to-day advice, counseling, and training on labor and employment matters and supports our corporate team with the labor and employment aspects of transactions.

**Nicholas C. Watt** is a Founding Partner of the Madison, Wisconsin law firm of Kramer, Elkins & Watt, LLC. He received his undergraduate degree from the University of Illinois at Urbana-Champaign majoring in Political Science and minoring in Mathematics. He received his law degree from the University of Wisconsin-Madison. Attorney Watt's practice is concentrated in the areas of family law and general civil litigation. Attorney Watt sits on the Board of Directors for the Solo Small Firm and General Practice Section of the State Bar of Wisconsin. He is also a member of the State Bar of Wisconsin, the Dane County Bar Association, and the James E. Doyle Inns of Court. Attorney Watt is also Chairman of the Board of Directors for The Badger Project, a non-profit, independent, non-partisan, investigative journalism organization focusing on Wisconsin politics and government.

### Rise of Remote Work

- I. Since the COVID-19 Pandemic, the use of remote work has exploded.
  - A. In 2019, approximately 7% of the US workforce telecommuted. After the pandemic, that number has nearly tripled.
  - B. US job postings advertising permanent remote work grew from about 2% prior to 2020 and is now between 8-11% today.
  - C. For those with jobs conducive to remote-capable work, between 40-50% of employees either work a hybrid schedule or exclusively from home/remotely.
- II. Considerations for Remote Work
  - A. Provides flexibility and convenience to employees who can work at times that fit ever increasing busy schedules.
  - B. Employers can cast a wider net for available job talent – the labor pool is no longer restricted to the employer’s office location
  - C. Cost savings on overhead such as office space and office support staff
  - D. Legal considerations, specifically the focus of this presentation – what happens if there is a falling out or dispute between a Wisconsin based employer and a remote employee in another state?

### Personal Jurisdiction

- I. Determining personal jurisdiction is a two-step analysis. Kopke v. A Hartrodt S.R.L., 2001 WI 99, ¶8, 245 Wis. 2d 396, 629 N.W.2d 662.
  - A. First step – whether section 801.05 of the Wisconsin Statutes, Wisconsin’s long arm statute, confers personal jurisdiction on an out-of-state defendant. Id.
    1. General personal jurisdiction. Wis. Stat. § 801.05(1)
      - a. Subsection 801.05(1) outlines 4 general criteria for personal jurisdiction.



LLC v. Wheeler, 2010 WI App, ¶14, 322 Wis. 2d 738, 780 N.W.2d 529.

2. Whether the exercise of Wisconsin’s personal jurisdiction over a defendant comports with “fair play and substantial justice” as determined by a five-part test. Kopke, ¶23
  - a. Burden on the defendant
  - b. The interest of Wisconsin
  - c. The plaintiff’s interest in obtaining relief
  - d. Judicial efficiency
  - e. Shared interest of the states in furthering substantive social policies. Stayart v. Hance, 2007 WI App, ¶28, 305 Wis. 2d 380, 740 N.W.2d 168.
3. Courts presume the long-arm statute satisfies due process requirements as the minimum contacts requirement is codified in section 801.05. Capitol Fixture and Woodworking Group v. Woodman Distributors, Inc., 147 Wis. 2d 157, 161, 432 N.W.2d 647 (Ct. App. 1988)
  - a. Defendant may rebut this presumption by showing that any contacts with Wisconsin are insufficient. Stayart v. Hance, 2007 WI App 204, ¶17, 305 Wis. 2d 380, 740 N.W.2d 168.
  - b. Plaintiffs carry the burden on proving the defendant purposefully established minimum contacts in Wisconsin. Defendants have the burden of showing a compelling case that assertion of personal jurisdiction offends notions of fair play and substantial justice. Id. at ¶18.

II. Substantial, but not isolated, activities under Wis. Stat. § 801.05(1)(d) and minimum contacts to satisfy due process requirements

A. Determination of whether a nonresident defendant engaged in substantial activities in Wisconsin requires analysis of five factors

1. The quantity of contacts
2. The quality of contacts
3. The source of the contacts and their connection to the cause of action
4. The state’s interest
5. The convenience of the parties. FL Hunts, LLC v. Wheeler, 2010 WI App 10, ¶13, 322 Wis. 2d 738, 780 N.W.2d 529.

B. However, the substantial and not isolated contacts must be viewed at the time the action is commenced – not the entire history of the defendant’s relationship with Wisconsin. See Sub-Zero Freezer Co. v. R.J. Clarkson Co., 159 Wis. 2d 230, 233-34, 464 N.W.2d 52 (Ct. App. 1990) (South Carolina defendant was engaged isolated activities when its most recent contact with Wisconsin was a product

order two years prior despite its thirteen year business relationship with plaintiff prior to that)

C. Generally, contacts are substantial enough if a defendant maintains a continuing business relationship with someone in Wisconsin, even if done by long-distance communications. Id.

1. Physical presence is not required, business transacted solely by mail and wire communications across state lines is sufficient if the analysis of those contacts fit into the five factors. Stayart v. Hance, 2007 WI App 204 at ¶20.

D. In a contractual or business relationship, the courts determine with a defendant's contacts with Wisconsin are purposeful by looking at the terms of the contract and the parties' course of action and dealing. Johnson Litho Graphics of Eau Claire, Ltd. v. Sarver, 2012 WI App 107, ¶20, 344 Wis. 2d 374, 824 N.W.2d 127.

1. Existence of a contract with an out-of-state party is not enough, in and of itself, to establish sufficient contact. CITGO Petroleum Corp. v. MTI Connect, LLC, 2020 WI App 57, ¶23, 394 Wis. 2d 126, 949 N.W.2d 577.

E. The determination on whether a defendant's contacts are substantial and whether the requisite minimum of contacts are met for due process considerations are often times one in the same – if the due process requirement for contact with Wisconsin is met, then the substantial test under 801.05(1)(d) is also met. Bushelman v. Bushelman, 2001 WI App 124, ¶16, 246 Wis. 2d 317, 629 N.W.2d 795.

### III. Fair play and substantial justice

A. The due process question of fair play and substantial justice is a fact intensive analysis requiring examination of the specific facts and circumstances of each case as applied to the five factors.

1. Touchstone of fair play and substantial justice analysis is reasonableness and fairness. In Re All-Star Ins. Corp., 110 Wis. 2d 72, 78, 327 N.W.2d 648 (1983).

2. The analysis is to be qualitative and not quantitative. Clement v. United Cerebral Palsy of Southeastern Wisconsin, Inc., 87 Wis. 2d 327, 335, 274 N.W.2d 688 (1979).

B. The five factors are to be seen as a balancing test and not a rote formula to be applied across all cases. Thus, no single factor is dispositive. Johnson Litho Graphics of Eau Claire, Ltd. v. Sarver, 2012 WI App 107, ¶33, 344 Wis. 2d 374, 824 N.W.2d 127.

1. Not all factors will be relevant in every case. See Stayart v. Hance, 2007 WI App 204, ¶32.

2. However, with regards to the factor related to Wisconsin's interest, Wisconsin courts have held that "Wisconsin has an unquestionable interest in providing its citizenry with a forum to adjudicate claims arising here." Kopke v. A. Hartrodt S.R.L., 2001 WI 99, ¶40, 245 Wis. 2d 396, 629 N.W.2d 662.

### Contracts & Clauses

- Forum Selection Clauses: How to ensure they are "mandatory" rather than "permissive."
- Choice of Law Clauses: Distinguishing between which state's *laws* apply vs. which state's *courts* have power.
- Consent to Jurisdiction: Expressly having the remote employee waive jurisdictional objections as a condition of employment.
- The "Home Office" Designation: Explicitly defining the "place of performance" in the contract, even if that performance is digital.

### Wisconsin Court Decisions on Personal Jurisdiction.

1. FL Hunts, LLC v. Wheeler, 2010 WI App 10, 322 Wis. 2d 738, 780 N.W.2d 529

Wisconsin LLC FL Hunts provides wild game hunting services and subsidiary to a Wisconsin corporation, Field Logic, Inc. that produced and distributed hunting products. Wheeler, a Kansas resident, contacted Field Logic about a sponsorship arrangement. Wheeler signed an employment agreement to guide whitetail deer and turkey hunts in Kansas.

Wheeler visited Wisconsin for four days, at which time at least part of the employment agreement was negotiated. FL Hunts was to pay Wheeler a portion of sponsorship money received from manufacturers for his endorsement and use of the those products during hunts. FL Hunts was also to continuing making sponsorship payments to Wheeler for three years after termination of the employment agreement.

After the Wisconsin companies terminated Wheeler's agreement, they alleged breach of the employment agreement for Wheeler's failure to return company financial information and company equipment. During his employment, Wheeler traveled to Wisconsin once a year. The parties maintained regular contact through phone and email. The companies sent hunting equipment from Wisconsin to Kansas where it remained. Wheeler provided no guided hunts in Wisconsin. Wheeler's termination was December 31, 2006 and the complaint was filed November 5, 2007.

The court found that Wisconsin did not have personal jurisdiction over Wheeler at the time the complaint was filed. It also found that the business records it was attempting to

recover were not goods, documents of title, or other things of value related to special jurisdiction under Wis. Stat. § 801.05(5)(d).

2. Johnson Litho Graphics of Eau Claire, Ltd. v. Sarver, 2012 WI App 107, ¶33, 344 Wis. 2d 374, 824 N.W.2d 127.

Sarver, an Illinois resident, solicited Johnson Litho Graphics for its printing needs. Sarver continued to place orders via phone, email, and fax over the course of six years. Sarver approved proofs created by Johnson Litho, directed shipment of goods and made payments received in Wisconsin.

The trial court found that Wisconsin did not have personal jurisdiction over Sarver because Sarver never entered Wisconsin in connection with its business with Johnson Litho. Its only contacts were making payments to Wisconsin and telecommunications from Illinois to Wisconsin. The Court of Appeals reversed.

The Sarver court stated that “a nonresident defendant who initiates negotiations with and solicits a Wisconsin company to enter into a contract may be said to have established sufficient minimum contacts,” and one “who makes repeated contacts or creates continuing obligations with a Wisconsin company may establish sufficient minimum contacts.” ¶¶21-23.

3. Druschel v. Cloeren, 2006 WI App 190, 295 Wis. 2d 858, 723 N.W.2d 430.

Cloeren was a Texas resident and owner of Texas corporation Cloeren, Inc. He sought to purchase a Wisconsin business from Druschel. Cloeren closed on the purchase of Druschel’s business, executing a secured promissory note in his individual capacity for Druschel’s stock. After completion of the sale, Cloeren formed a new company. Cloeren defaulted on the note and Druschel sued.

The court found that Cloeren visited Wisconsin 6-8 times between 1997 and 2003 when the action commenced, for 2-4 days per trip, had four conversations weekly with Wisconsin residents about the sales, marketing, orders, employees, designs, and other business matters, he was involved in the management, and owner of, the newly merged company located in Chippewa County, and “had continues and systematic general business contacts” in Wisconsin.

Cloeren argued that these contacts were as an agent of his business and not his personal capacity arguing what some other states adopted as the “fiduciary shield doctrine.” The note in default had been signed in his personal capacity and Druschel sued Cloeren in his personal capacity. The court was unpersuaded and stated that Cloeren’s contacts with Wisconsin, whether personal or business related, were still his contacts with Wisconsin.

## Claims by Employees

- Generally, the employment laws (minimum wage, overtime, rest breaks) of the state where the work is performed apply, regardless of where the company is headquartered.
  - *Example:* A Wisconsin firm with a remote worker in California must comply with California's higher minimum wage and stricter meal-break laws.
- 7th Circuit Restriction on Nationwide Collectives: *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718 (7th Cir. Aug. 16, 2024).
  - Under both the due process requirements of the Fifth Amendment and rules governing effective service of process when a federal statute like the FLSA does not authorize nationwide service, a federal district court must have personal jurisdiction over each opt-in plaintiff's claims in a collective action under the FLSA in order to decide those plaintiffs' claims..
  - This prevents forum shopping where a remote worker tries to bring a nationwide class action into a single favorable court.

## Questions/Considerations

1. Does a presumed unequal bargaining power between employer and employee favor against jurisdiction in terms of the burden/inconvenience to the defendant factor?
2. Do the administrative actions of the worker to do its job matter?
  - a. Locations of server (VPN or cloud-based)
  - b. Zoom meeting attendance
  - c. Direct/instant messaging like Slack
  - d. If these things are required and expected are they unilateral actions imposed by the employer on the employee?
3. Did the worker make first contact about a job?
4. How much of the employee's work is directed toward Wisconsin?
5. What language should you put in an employment agreement?
6. If you terminate the employee, does that terminate any substantial contacts with Wisconsin, assuming there were any to begin with?
7. How "purposeful" have the worker's contacts been with Wisconsin?
8. Where is the worker located? Does that state have employment laws that would effect your contract? Determination of employee v contractor?