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1) Anti-Kickback
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1) ANTI-KICKBACK

Chapter 448. Medical Practices
Subchapter II - Medical Examining Board
Wis. Stat. §§ 448.08; 448.09: Fee splitting; Separate billing required.

It is unlawful for any person licensed by the Medical Examining Board (i.e., physicians, perfusionists, physician assistants, and respiratory care practitioners) to give or receive, directly or indirectly, any fee, commission, rebate, or other form of compensation for sending, referring or otherwise inducing a person to communicate with a licensee in a professional capacity, or for any professional services not actually rendered personally or at the direction of the licensee. Any licensee who furnishes medical or surgical services, advice or assistance must, except if otherwise authorized by the Medicare or Medicaid program, render an individual statement or account of the charges directly to the patient. Unless an exception applies, the individual statement or the account of charges generated by each physician or person who renders services, advice or assistance to a patient must be distinct and separate from the statement or the account of charges of any other physician or person who also renders services, advice or assistance to the same patient. A physician who violates these sections is punishable by a fine of not more than $25,000 or imprisonment for not more than nine months or both. A violation of these sections is punishable by a fine of not more than $10,000 or imprisonment for not more than nine months or both.
Wisconsin | Summary of Fraud and Abuse Statutes

Chapter 946. Crimes Against Government and Its Administration
Subchapter VI - Racketeering Activity and Continuing Criminal Enterprise
Wis. Stat. § 946.91(6): Medical Assistance fraud
It is unlawful for anyone, in connection with Medical Assistance when the cost of the services provided to the patient is paid for in whole or in part by the state, to intentionally charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under Medical Assistance, any gift, money, donation, or other consideration as a precondition of admitting a patient to a hospital, skilled nursing facility, or intermediate care facility, or as a requirement for the patient's continued stay in such a facility. This does not include charitable, religious, or philanthropic contributions from an organization or from a person unrelated to the patient. A violation of this law is a Class H felony, the penalty for which is a fine of not more than $25,000.

Chapter 448. Medical Practices
Subchapter III - Physical Therapists Affiliated Credentialing Board
Wis. Stat. §§ 448.56, 448.59: Practice requirements.
It is unlawful for a physical therapist to give or receive, directly or indirectly, to or from any other person a fee, commission, rebate, or other form of compensation or anything of value for sending, referring, or otherwise inducing a person to communicate with a therapist in a professional capacity. Section 448.59 provides that a violation is punishable by a fine of not more than $10,000 or imprisonment for not more than nine months or both.

Chapter 448. Medical Practices
Subchapter IV - Podiatry Affiliated Credentialing Board
It is unlawful for a podiatrist to give or receive, directly or indirectly, to or from any other person a fee, commission, rebate, or other form of compensation or anything of value for sending, referring, or otherwise inducing a person to communicate with a therapist in a professional capacity. Section 448.69 provides that a violation is punishable by a fine of not more than $10,000 or imprisonment for not more than nine months or both.

Chapter 150. Regulation of Health Services
Subchapter IV - Health Care Cooperative Agreements
A cooperative agreement is an agreement between two health care providers or among more than two health care providers to share, allocate or refer patients to one another; or the sharing or allocation of personnel, instructional programs, support services and facilities, medical, diagnostic or laboratory facilities or procedures, or other services customarily offered by health care providers. Health care providers can enter into cooperative agreements if the agreement is certified by the Department of Health and Family Services through issuance of a certificate of public advantage. To qualify for the certificate, the benefits likely to result from the agreement must substantially outweigh the likely resulting disadvantages attributable
to the reduction in competition. In addition, any reduction in competition must be reasonably necessary to achieve the likely benefits. The parties to the cooperative arrangement must prepare a written agreement which must include a description of the nature and scope of the contemplated cooperation. The Department of Health and Family Services may terminate a cooperative agreement under a certificate of public advantage if the benefits from the cooperative agreement no longer outweigh any disadvantages. If a party to a cooperative agreement terminates its participation in the agreement, the party must file a notice of termination with the Department of Health and Family Services within thirty days after the termination takes effect.

Chapter Chir 6 - Chiropractic Examining Board
It is unprofessional conduct for a chiropractor to negate the co-payment or deductible provisions of a contract of insurance by agreeing to forgive any or all of the patient's obligation for payment under the contract unless the chiropractor reduces the chiropractor's claim to the insurance carrier in regard to that patient by an equal proportion. A chiropractor may adjust the fees charged to payments, but the fee charged must be accurately reported to any third party payor. It is no violation of this rule for a chiropractor to provide treatment without any charge.

Chapter DE 5 - Dentistry Examining Board
It is unprofessional conduct for a dentist or a dental hygienist to participate in a rebate or fee-splitting arrangement with a health care practitioner unless the arrangement is disclosed to patients.

Chapter NHA 5 - Nursing Home Administrator Examining Board
Wis. Admin. Code § NHA 5.02(12): Unprofessional conduct.
A person is unfit to practice as a nursing home administrator if the person commits or aids or abets the commission of rebate or fee-splitting arrangements with health care providers.

Chapter Med 10 - Medical Examining Board
Wis. Admin. Code § Med 10.03(1)(h): Unprofessional Conduct
It is unprofessional conduct for anyone licensed by the Medical Examining Board to directly or indirectly give or receive any fee, commission, rebate, or other compensation for professional services not actually and personally rendered, unless allowed by law. This prohibition does not preclude the legal functioning of lawful professional partnerships, corporations, or associations.

Chapter Opt 5 - Optometry Examining Board
Wis. Admin. Code § Opt 5.03(9) & (18): Unprofessional conduct.
It is unprofessional conduct for an optometrist to split or divide any fee for optometric service with any person, except an associate licensed optometrist.
Wisconsin | Summary of Fraud and Abuse Statutes and Regulations

Chapter Phar 10 - Pharmacy Examining Board

**Wis. Admin. Code § Phar 10.03(14): Unprofessional conduct.**

It is unprofessional conduct for a pharmacist to participate in a fee-splitting arrangement with a health practitioner or a health care facility.

**Attorney General Opinions:**


The fee splitting statute Wis. Stat. § 448.08(1), prohibits the receiving of any fee for sending, referring or otherwise inducing a person to communicate with a licensee in a professional capacity; or for receiving a fee for any professional services not actually rendered personally or at the direction of the licensee. There is no violation of the statute, where a physician, through a service corporation owned by the physician, bills the patient for his own services, and that of the physical therapist employed by the corporation, provided the billing states an accurate dollar figure for the respective services.

**OAG 31-86 (1986)**

The fee splitting statute Wis. Stat. § 448.08(5) exempts physicians who are in the employ of or under contract to provide consulting services to hospitals or medical education and research organizations from the fee splitting proscription and separate billing requirements of section 448.08 and allows such organizations to bill patients for services rendered by employed or consulting physicians. An organization qualifies as a medical education and research organization if its dominant purpose and primary function is to provide medical education and conduct medical research, if it is operating on a nonprofit basis and if any other aim or function of the organization is incidental to the dominant purpose and primary function. This includes a wholly-owned subsidiary corporation of the hospital and/or organization.

**Key State Case:**

*Maleki v. Fine-Lando Clinic Chartered, S.C.*, 154 Wis. 2d 471, 453 N.W.2d 208 (Ct. App. 1990); *aff’d*, 162 Wis.2d 73, 469 N.W.2d 629 (Wis. 1991).

**Case:** The plaintiff/physician alleged that physician owners of the Fine Lando Clinic asked him to obtain privileges at a nearby hospital so that the plaintiff could practice cardiology at that hospital. The alleged objective, according to the plaintiff, was to allow the Fine Lando Clinic to send patient referrals to the plaintiff and split the fees earned as a result of the referrals. The plaintiff refused to enter into the fee-splitting arrangement with the clinic. However, another cardiologist, Dr. Co, who also practiced at the hospital agreed to enter into the arrangement with the Fine Lando Clinic. The plaintiff stated that when he refused to engage in the fee-splitting arrangement with the Fine Lando Clinic, there was a decline in cardiology referrals to his practice and eventually he was no longer receiving any referrals from the Fine Lando Clinic. Accordingly, plaintiff brought this action against the Fine Lando Clinic and Dr. Co alleging that he was the victim of a conspiracy between the Fine Lando Clinic and Dr. Co to injure his business.
**Holding:** The prohibition against fee-splitting found in § 448.08(1) protects members of the public who might otherwise be subjected to treatment by a physician or surgeon offering the referring surgeon the largest fee or commission, regardless of the treating physician's ability or skill. It does not create a right that is enforceable by a physician whose business might be adversely affected by an illegal fee-splitting arrangement.

2) PROHIBITIONS ON SELF-REFERRAL

Chapter 49. Public Assistance and Children and Family Services
Subchapter IV. Medical Assistance

**Wis. Stat. § 49.45(3)(L)**

It is unlawful for a physician to refer a patient to a provider for a designated health service if the physician, or an immediate family member of that physician, has a financial relationship with the provider. A financial relationship includes an ownership or investment interest in the provider, or a compensation arrangement with the provider, unless the relationship meets one of the exceptions stated in the Federal Stark Law, 42 U.S.C. § 135nn(c) - (e). Further, providers of designated health services must submit to the Department of Health Services information concerning the entity's ownership, investment, and compensation arrangements. Each day of continued failure to comply with this reporting requirement constitutes a separate offense. Failure to make such reports can result in forfeitures of up to $10,000.

Chapter DHS 106. Provider Rights and Responsibilities

**Wis. Admin. Code § DHS 106.06(11): Involuntary termination or suspension from program participation.**

The Department of Health Services (“Department”) may suspend or terminate the certification of any person, or entity participating as a health care provider under the medical assistance program if, after reasonable notice and the opportunity for a hearing, the Department finds that the provider at the time of the provider certification application or after receiving the certification knowingly misrepresented, concealed or failed to disclose to the Department the full and complete information regarding the identity of each person holding an ownership or controlling interest in the provider. The suspension or termination will become effective so long as it does not deny recipients access to medical assistance services.

Chapter DHS 106. Provider Rights and Responsibilities

**Wis. Admin. Code § DHS 106.06(12): Involuntary termination or suspension from program participation.**

The Department of Health Services (“Department”) may suspend or terminate the certification of any person, or entity participating as a health care provider under the medical assistance program if, after reasonable notice and the opportunity for a hearing, the Department finds that the provider at the time of the provider certification application or after receiving the certification knowingly misrepresented,
concealed or failed to disclose to the Department an ownership or controlling interest the provider held in a corporation, partnership, sole proprietorship or other entity certified under the medical assistance program. The suspension or termination will become effective so long as it does not deny recipients access to medical assistance services.

Chapter DHS 107. Covered Services
Medical assistance reimbursement shall not be available for outpatient psychotherapy services that are self-referrals. A self-referral occurs when a provider refers a recipient to an agency in which the provider has a direct financial interest or to himself or herself acting as a practitioner in private practice.

3) FALSE CLAIMS/FRAUD & ABUSE

Note: Wisconsin repealed its primary statute pertaining to false claims for medical assistance, Wis. Stat. § 20.931, effective July of 2015. The impact of the repeal was to eliminate private individuals’ authority to bring qui tam actions for false claims for medical assistance. Although individuals may still inform the state about cases of medical assistance fraud, those individuals are no longer entitled to claim a share of any awards, as they were when the statute was in effect. The repeal also scaled back some of the protections afforded to whistleblowers in cases of medical assistance fraud. While Wisconsin law still provides protection to whistleblowers, the remedies available to such individuals if they are retaliated against are not as robust as they had been under Wis. Stat. § 20.931. Despite the repeal of this statute, there are still a number of laws still in effect that allow the state to prosecute Medicaid fraud.

Chapter 49. Public Assistance
Wis. Stat. § 49.485: False Claims.
Prohibits knowing presentation of false claims to state officials made in relation to the state’s medical assistance program. It calls for a penalty between $5,000 and $10,000 for each claim and allows for treble damages.

Chapter 49. Public Assistance
Wis. Stat. § 49.49(4m): Medical Assistance Offenses: Prohibited conduct; forfeitures
Prohibits knowingly false statements or misrepresentations in applying for a benefit or payment or in determining rights to a benefit or payment. The statute also prohibits knowing concealments and failures to disclose known events that affect a person's initial or continued right to a benefit or payment, both directly and for others on whose behalf application is made or benefits or payments are received. Each statement, representation, concealment or failure is punishable by a fine between $100 and $15,000.
Chapter 146. Miscellaneous Health Provisions

Wis. Stat. § 146.905: Reduction in fees prohibited

It is unlawful for a health care provider that provides a service or a product to an individual with coverage under a disability insurance policy to reduce or eliminate, or offer to reduce or eliminate, coinsurance or a deductible required under the terms of the disability insurance policy unless payment of the total fee would impose an undue financial hardship on the individual receiving the service or product.

Chapter 946. Crimes Against Government and Its Administration

Subchapter VI - Racketeering Activity and Continuing Criminal Enterprise

Wis. Stat. § 946.91(2): Medical Assistance fraud

Makes it a Class H felony to intentionally make or cause to be made any false statement or representation of a material fact in any application for, or for use in determining eligibility for, any Medical Assistance benefit or payment. The statute also makes it a Class H felony to have knowledge of and conceal or fail to disclose any event affecting the initial or continued eligibility for any Medical Assistance benefit or payment with an intent to fraudulently secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, both directly and for others on whose behalf application is made or benefits or payments are received. Finally, it is a Class H Felony to apply to receive any Medical Assistance benefit or payment for the use and benefit of another, but then willfully convert the benefit or payment or any part thereof to a use that is not for the benefit the other person.

Chapter 49. Public Assistance and Children and Family Services

Subchapter IV - Medical Assistance

Wis. Stat. § 49.49(1): Medical Assistance Offenses

The penalty for violating § 946.91(2), supra, is an amount 3 times the amount of actual damages sustained as a result of any excess payments made in connection with the offense. Proof by the state of a conviction under § 946.91(2) in a civil action shall be conclusive regarding the state's right to damages and the only issue in controversy shall be the amount, if any, of the actual damages sustained. Actual damages shall consist of the total amount of excess payments, any part of which is paid by state funds. In any such civil action the state may elect to file a motion in expedition of the action. Upon receipt of the motion, the presiding judge shall expedite the action.

Chapter 946. Crimes Against Government and Its Administration

Subchapter VI - Racketeering Activity and Continuing Criminal Enterprise

Wis. Stat. § 946.91(4): Medical Assistance fraud

It is unlawful to knowingly and willfully make, induce, or cause to be made any false statement or representation of a material fact regarding the conditions or operation of any institution or facility in order that such institution or facility may qualify either upon initial certification or upon recertification as a hospital, skilled nursing facility,
intermediate care facility, or home health agency. A violation of this law is a Class H felony, the penalty for which is a fine of not more than $25,000.

Chapter 946. Crimes Against Government and Its Administration
Subchapter VI - Racketeering Activity and Continuing Criminal Enterprise
Wis. Stat. § 946.91(5): Medical Assistance fraud
It is unlawful to knowingly impose upon a Medical Assistance recipient charges in addition to payments received for services under the state Medical Assistance program, or knowingly impose direct charges upon a recipient in lieu of obtaining payment. A violation of this law is a Class H felony, the penalty for which is a fine of not more than $25,000.

Chapter DHS 106. Provider Rights and Responsibilities
Wis. Admin. Code § DHS 106.04(3): Payment of claims for reimbursement; and
Wis. Admin. Code § DHS 106.06(21): Involuntary termination or suspension from program participation.
When a provider furnishes services to a medical assistance recipient, the provider may not attempt to impose or charge for an individual procedure or for overhead which is included in the medical assistance reimbursement for the services provided. Further, the provider may not attempt to impose an unauthorized charge or receive payment from the medical assistance recipient, a relative or other person for the services provided, or impose direct charges upon the medical assistance recipient in lieu of obtaining payment from the Department of Health Services (“Department”). Instead, the provider must accept payments made by the Department as payment in full for the services furnished to the medical assistance recipient patient. Notwithstanding the above, an exception applies and a provider is permitted to impose a charge on a medical assistance recipient under the following conditions: (1) a service is desired, needed or requested by the medical assistance recipient but it is not covered under the medical assistance program or is denied by the medical assistance program and the recipient is advised of the denial before receiving the service; (2) an applicant is determined to be eligible retroactively but has already been billed by the provider. In this case the provider, once informed of the patient’s retroactive eligibility must reimburse the patient in full once payment is received from the medical assistance program; or (3) a medical assistance recipient in a nursing home chooses to reside in a private room.

Chapter DHS 106. Provider Rights and Responsibilities
Wis. Admin. Code § DHS 106.06(14): Involuntary termination or suspension from program participation.
The Department of Health Services (“Department”) may suspend or terminate the certification of any person or entity participating as a health care provider under the medical assistance program, if after reasonable notice and the opportunity for a hearing the Department finds that the provider has knowingly made or caused to be made false statements or has misrepresented material facts in connection with the provider’s usual and customary charges submitted to the department as a claim for reimbursement.
Chapter DHS 106. Provider Rights and Responsibilities

Wis. Admin. Code § DHS 106.06(15): Involuntary termination or suspension from program participation.
The Department of Health Services (“Department”) may suspend or terminate the certification of any person or entity participating as a health care provider under the medical assistance program, if after reasonable notice and the opportunity for a hearing the Department finds that the provider has knowingly made or caused to be made false statements or misrepresentation of material facts in cost reports relating to the provider’s costs, expenditures or usual and customary charges submitted to the department for the purpose of establishing reimbursement rates under the program.

Chapter DHS 106. Provider Rights and Responsibilities

Wis. Admin. Code § DHS 106.06(19): Involuntary termination or suspension from program participation.
The Department of Health Services (“Department”) may suspend or terminate the certification of any person or entity participating as a health care provider under the medical assistance program, if after reasonable notice and the opportunity for a hearing the Department finds that the provider has offered or paid to another person, or solicited or received from another person, any remuneration in cash or in kind in consideration for a referral of a medical assistance recipient and the opportunity to furnish medical assistance covered services to the recipient. The suspension or termination will become effective so long as it does not deny recipients access to medical assistance services.

Chapter DHS 106. Provider Rights and Responsibilities

Wis. Admin. Code § DHS 106.06(20): Involuntary termination or suspension from program participation.
The Department of Health Services (“Department”) may suspend or terminate the certification of any person or entity participating as a health care provider under the medical assistance program, if after reasonable notice and the opportunity for a hearing the Department finds that the provider has failed to request from recipients the required copayment, deductible or coinsurance amount applicable to the service provided to recipients after having received a written statement from the department noting the provider’s repeated failure to request required copayments, deductible or coinsurance amounts and indicating the intent to impose a sanction if the provider continues to fail to make these requests.

Chapter DHS 108. General Administration

Wis. Admin. Code § DHS 108.02(9)(d): Department rights and responsibilities.
The Department of Health Services (“Department”) can withhold medical assistance payments to a health care provider upon receipt of reliable evidence that the provider committed fraud or willful misrepresentation under the medical assistance program. Within five days after taking such action, the Department must send written notice to the provider which sets forth the allegations. The withholding must end if a
preliminary investigation, law enforcement agency, or legal proceedings conclude that there is not sufficient evidence of fraud or misrepresentation.

Chapter Chir 6 - Chiropractic Examining Board  
**Wis. Admin. Code § Chir 6.02(14): Unprofessional conduct.**  
It is unprofessional conduct for a chiropractor to obtain or attempt to obtain compensation for chiropractic services by fraud. This provision specifies that fraud occurs when an individual bills for services not rendered or submits a claim for a fraudulent diagnosis. It further advises that a licensee’s use of “no out of pocket expense” payment arrangements may constitute insurance fraud and therefore also violate this section.

Chapter DE 5 - Dentistry Examining Board  
**Wis. Admin. Code § DE 5.02(8): Unprofessional conduct.**  
It is unprofessional conduct for a dentist or a dental hygienist to obtain or attempt to obtain any compensation by fraud.

Chapter Med 10 - Medical Examining Board  
**Wis. Admin. Code § Med 10.03(1)(g): Unprofessional Conduct**  
It is unprofessional conduct for anyone licensed by the Medical Examining Board to obtain or attempt to obtain any professional fee or compensation by fraud or deceit.

Chapter N 7 - Board of Nursing  
**Wis. Admin. Code § N 7.03(4)(b) & (5)(c-d): Grounds for denying or taking disciplinary action**  
It is misconduct to obtain or attempt to obtain any compensation by fraud, misrepresentation, deceit, duress, or undue influence in the course of nursing practice. It is also misconduct to engage in abusive or fraudulent billing practices, including violations of federal Medicare and Medicaid laws or state laws, or to submit false claims.

Chapter NHA 5 - Nursing Home Administrator Examining Board  
**Wis. Admin. Code § NHA 5.02(8): Unprofessional conduct.**  
A person is unfit to practice as a nursing home administrator if he or she obtains or attempts to obtain any compensation by fraud.

Chapter OT 5 - Occupational Therapy Examining Board  
**Wis. Admin. Code § OT 5.02(12): Unprofessional conduct defined.**  
It is unprofessional conduct for an occupational therapist to obtain or attempt to obtain a professional fee or compensation by fraud or deceit.

Chapter Opt 5 - Optometry Examining Board  
**Wis. Admin. Code § Opt 5.03(9) & (18): Unprofessional conduct.**  
It is unprofessional conduct for an optometrist to obtain or attempt to obtain anything of value by fraudulent representation in the practice of optometry.
Chapter 450 - Pharmacy Examining Board
Wis. Stat. § 450.10(1)(a)(7): Disciplinary proceedings; immunity; orders
It is unprofessional conduct for a pharmacist to obtaining or attempt to obtain compensation by fraud or deceit.

Chapter Pod 2 Unprofessional Conduct - Podiatrist Affiliated Credentialing Board
Wis. Admin. Code § Pod 2.01(12): Definition.
It is unprofessional conduct for a podiatrist to obtain or attempt to obtain a professional fee or compensation by fraud or deceit.

Chapter PT 7 - Physical Therapy Examining Board
It is unprofessional conduct for a physical therapist to engage in illegal or unethical business practices, including fraud, deceit, or misrepresentation in obtaining or attempting to obtain any fee or third-party reimbursement.

Chapter Psy 5 - Psychology Examining Board
Wis. Admin. Code § Psy 5.01(8): Professional conduct.
It is unprofessional conduct for a psychologist to engage in false, fraudulent, misleading or deceptive billing practices.

Attorney General Opinions:
A county sought to enter into a contract with a visiting nurse association whereby the county would pay the visiting nurse association funds in addition to those provided by the medical assistance program to the visiting nurse association. The attorney general emphasized that although the county could provide financial assistance to defray the cost of home health care by making a purely gratuitous donation to the visiting nurses association, the county could not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received through the Medicaid program. Supplementation violates Wis. Admin. Code § HFS 106.04(3) [now Wis. Admin. Code § DHS 106.04(3)], which states that “a provider may not attempt to impose an unauthorized charge or receive payment from a recipient, relative, or other person for services provided, or impose direct charges upon a recipient in lieu of obtaining payment under the program.”

A county health care center was billing the medical assistance program for out-of-county clients at the rate allowed by the state. In addition, the county health care center was billing out-of-county boards for payment of costs above the medical assistance rate. The attorney general found that this billing practice violated Wis. Stat. § 49.49(4) [now Wis. Stat. § 946.91(5)], which states that “no person, in connection with the medical assistance program when the cost of services provided to the patient is paid for in whole or in part by the state, may: (a) knowingly and willfully charge, for any service provided to a patient under a medical assistance
program, money or other consideration at a rate in excess of the rates established by the state.” Therefore, the county health care center may not charge for services furnished to medical assistance patients in excess of the medical assistance rates without violating Wis. Stat. § 49.49(4) [now Wis. Stat. § 946.91(5)].

Key State Cases:

*Case:* The state brought suit against a pharmaceutical manufacturer alleging that the manufacturer misrepresented the average wholesale price of its medications and thereby drove up the price at which the state medical assistance program would reimburse such medications, violating Wis. Stat. § 49.49(4m).

*Holding:* At trial the manufacturer was held to have violated § 49.49(4m) and, following a number of appeals on procedural issues that made their way to the state supreme court, the remainder of the case was remanded back to the appellate court where the findings of the trial court were ultimately upheld.


*Case:* Patients treated at a hospital for injuries sustained in a car accident brought suit against the tortfeasor for harm caused. The hospital filed a lien against any recovery made by the patients in their suit in lieu of seeking payment from the state medical assistance program. The patients brought a declaratory judgment against the hospital, arguing that the liens violated Wis. Stat. § 49.49(3m) preventing providers from imposing direct charges on patients in lieu of seeking payment from the state medical assistance program.

*Holding:* The trial court found in favor of the hospital, holding that the hospital's lien did not constitute a "direct" charge upon the patients and therefore did not violate § 49.49(3m). This holding was reversed at the appellate level, but ultimately upheld by the state supreme court.

**State of Wisconsin v. Kennedy, 105 Wis. 2d 625, 314 N.W.2d 884 (Ct. App. 1981)**

*Case:* A psychiatrist who had never actually furnished services to patients for which he sought medical assistance reimbursement, was charged with theft by fraud in connection with his submission of 87 Medicaid claims for “individual psychiatric examinations”.

*Holding:* The evidence was sufficient to find that the defendant knowingly made false representations when he described the non-existent services rendered as “individual psychiatric examinations.”
4) UNFAIR BUSINESS PRACTICES

Chapter 100. Marketing; Trade Practices
Wis. Stats. § 100.182(2): Fraudulent drug advertising
It is unlawful for anyone to advertise the availability of any drug or publish or circulate such an advertisement with the intent of selling, increasing the consumption of or generating interest in the drug if the advertisement contains any untrue, deceptive or misleading representations material to the effects of the drug.

Chapter 100. Marketing; Trade Practices
Wis. Stats. § 100.31(2): Unfair discrimination in drug pricing
Although discounts for volume purchasers are permitted, every seller must offer drugs that are deemed therapeutically equivalent drugs (by the Food and Drug Administration) to every purchaser in the state, with all the same rights and privileges offered or accorded by the seller to the most favored purchaser. Such rights and privileges shall include, rebates, free merchandise, samples and similar trade concessions.

Chapter 133. Trusts and Monopolies
Wis. Stats. § 133.05: Secret Rebates; Unfair Trade Practices.
A secret payment or allowance of rebates, refunds, commissions, or unearned discounts is an unfair trade practice. The secret rebate, refund or discount afforded to certain purchasers of services or privileges but not extended to all purchasers who purchased goods or services based on like terms and conditions is an unfair trade practice. These unfair trade practices are prohibited, and a violation of this section may result in a fine of not more than $25,000, imprisonment in a county jail for not more than a year or both.

Chapter Chir 6 - Chiropractic Examining Board
It is unprofessional conduct for a chiropractor to advertise in a manner which is false, deceptive or misleading. The rule contains examples of advertising that would be considered false, deceptive, or misleading.

Chapter DE 5 - Dentistry Examining Board
Wis. Admin. Code § DE 5.02(12): Unprofessional conduct.
It is unprofessional conduct for a dentist or a dental hygienist to advertise in a manner which is false, deceptive, or misleading.

Chapter Med 10 - Medical Examining Board
Wis. Admin. Code § Med 10.03(1)(k): Unprofessional Conduct
It is unprofessional conduct for anyone licensed by the Medical Examining Board to engage in misleading, false, or deceptive advertising.
Chapter N 7 - Board of Nursing

Wis. Admin. Code § N 7.03(5)(i): Grounds for denying or taking disciplinary action
It is misconduct to engage in misleading, false, or deceptive advertising or marketing.

Chapter NHA 5 Standards of Conduct

Wis. Admin. Code NHA § 5.02(10) - Nursing Home Administrator Examining Board: Unprofessional conduct.
A person is unfit to practice as a nursing home administrator if the person advertises in a manner which is false, deceptive, or misleading.

Chapter Opt 5 - Optometry Examining Board

Wis. Admin. Code Opt § 5.03(9) & (18): Unprofessional conduct.
It is unprofessional conduct for an optometrist to engage in any conduct of a character likely to deceive or defraud the public. Additionally, it is unprofessional conduct if an optometrist advertises in a manner that is false, fraudulent, misleading or deceptive. This includes statements creating false, fraudulent, or unjustified expectations of favorable results including advertising professional superiority or the performance of professional services in a superior manner; statements making comparisons with other optometrists which are false, fraudulent, misleading, or deceptive; statements containing representations that would be likely to cause a reasonable person to misunderstand or be deceived; or seeking to obtain patients by advertising or other forms of solicitation in a manner that is false, fraudulent, misleading, or deceptive.

Chapter Phar 10 - Pharmacy Examining Board

It is unprofessional conduct for a pharmacist to advertise in a manner which is false, deceptive or misleading; to dispense sample drug products for any financial consideration; or to exercise undue influence on, or take unfair advantage of, a patient in the promotion or sale of services, drugs or other products for the financial gain of the pharmacist or a third party.

Attorney General Opinion:

State and local units of government are not “purchasers” under Wis. Stat. § 100.31. It is unlikely that either the state or local units of government will be substantial competitors of the private sector in the retailing of drugs to consumers. Accordingly, sellers of drugs are not prohibited from offering state and local units of government pricing arrangements which are not made available to other purchasers. Drug purchases made by state and local governmental bodies are usually intended for use in the care of patients in publicly funded institutional operations and public health care facilities. Therefore drug purchases by state and local governmental bodies are exempt from Wis. Stat. § 100.31 if the intended use includes the following: (1) inpatient use in the treatment of a patient at a health care facility; (2)
emergency facility patient use; (3) outpatient personal use on the healthcare facility premises; (4) inpatient, or emergency facility patient use upon his discharge and for his personal use away from the premises; (5) outpatient personal use away from the premises; (6) health care facility's employee or student personal use or for the use by his dependent; or (7) physician/member of health staff (but non-employee) personal use or for the use of his dependent.

Key State Law Case:

**Case:** The plaintiffs, independent retail pharmacies, alleged that the defendants, manufacturers and wholesalers of pharmaceutical drugs, engaged in illegal price discrimination, secret rebates, and a conspiracy in restraint of trade by illegally discounting their products to HMOs and other institutional healthcare providers in order for the defendants to have their products listed as those that would be covered by the various HMOs. The pharmacies alleged that as a result of these illegal discounts to HMOs and other providers, the pharmacies were being forced to pay prices which were too high to allow them to compete.

**Holding:** *Wis. Stat. § 133.05* prohibits the “secret payment or allowance of rebates, refunds, commissions or unearned discounts . . . or the secret extension to certain purchasers of special services or privileges not extended to all purchasers . . . such payment, allowance or extension injuring or intending to injure a competitor or destroying or tending to destroy competition, is unfair trade practice and is prohibited."

Under this statute, the plaintiffs only need to allege that the payment or receipt of secret rebates, refunds, commissions, or unearned discounts were extended to certain Wisconsin purchasers but were not extended to all Wisconsin purchasers on like terms and conditions, and that such payments had or tended to have an injurious effect on a Wisconsin competitor (*i.e.* independent retail pharmacies), or that the payments destroyed or tended to destroy competition in Wisconsin. The court concluded that the plaintiffs had presented sufficient allegations to support a claim therefore the defendant's motion to dismiss was denied.

**5) GENERAL WHISTLE-BLOWER PROTECTIONS**

**Chapter 46. Social Services**

*Wis. Stat. § 46.90(4): Elder abuse reporting system.*

Under the Wisconsin elder abuse reporting system no person may discharge or otherwise retaliate or discriminate against any person for reporting a case of elder abuse if the report of the abuse was made in good faith. There is a presumption that a reporting individual has acted in good faith. No person can be held civilly or criminally liable or be held guilty of unprofessional conduct for making a report in good faith. In case there is some retaliation or discrimination against the person filing the report, there will be a rebuttable presumption that the retaliation was made in
response to the report if the retaliation occurred within 120 days after the report alleging the abuse was filed.

Chapter 50. Uniform Licensure: Care and Service Residential Facilities  
**Wis. Stat. § 50.07: Prohibited acts.**  
Wis. Stat. § 50.07 prohibits retaliation or discrimination against residents or employees of a care and service residential facility who contact or provide information to a state official or long term care ombudsman. The section also prohibits discrimination against a resident or employee on whose behalf another person contacted or provided information to a state official, including the office of the long term care ombudsman. Violation of this section may result in imprisonment of up to 6 months and/or a fine of not more than $1,000.

Chapter 146. Miscellaneous Health Provisions  
**Wis. Stat. § 146.997: Health care worker protection.**  
It is prohibited for an employer of a health care worker to threaten disciplinary action or take disciplinary action against a health care worker who reports in good faith that: (i) a health care provider has violated state or federal laws or regulations; (ii) the quality of health care services provided by the health care facility violates any standard established by state or federal laws or regulations, or (iii) the quality of health care services provided by a health professional violates clinical or ethical standards established by a professionally recognized accrediting body. The health care worker/employee is protected if he or she first reports the information to a state agency, an accrediting or standard-setting body, an officer or director of the health care provider, or another employee who is in a position to take corrective action. The reporting health care worker/employee is also protected when initiating or testifying in an action or providing information to the legislature. Any health care facility or health care provider who takes disciplinary action against or threatens to take disciplinary action against the health care worker/employee who files a report in good faith shall be subject to civil penalties: $1,000 for the first violation, not more than $5,000 for a violation committed within 12 months of the previous violation and not more than $10,000 for a violation committed within 12 months of 2 or more previous violations.

Chapter 230. State Employment Relations  
**Wis. Stats. § 230.83(1): Retaliatory Action Prohibited.**  
Under this statute, no appointing authority, agent, or supervisor may retaliate or threaten retaliation against a state employee who discloses information about a violation or mismanagement of authority that is not prohibited from disclosure by state or federal law. The protection only applies if the employee is a government employee and the employee follows specific disclosure protocol outlined in Wis. Stat. § 230.81 (i.e., disclosing the information in writing to the employee’s supervisor; or disclosing the information in writing only to the governmental unit that the division of equal rights determines is appropriate.)
Chapter 230. State Employment Relations

**Wis. Stat. § 230.90: Government Employer Retaliation Prohibited.**

Government employees who exercise their rights under the First Amendment of the United States Constitution or Article I Section 3 of the Wisconsin Constitution by lawfully disclosing information which the employee believes demonstrates: (i) a violation of any state or federal law, rule or regulation; (ii) mismanagement or abuse of authority in state government; (iii) a substantial waste of public funds; or (iv) a danger to public health and safety, are protected from retaliation by the employer. An employee who is retaliated against for lawfully disclosing such information may bring an action in circuit court against his or her employer or employer's agent. The employee must bring the action within two years after the retaliatory action allegedly occurred or after the employee learned of the retaliatory action, whichever occurs last.

**Key State Law Cases:**

- **Repetti v. Sysco Corp., 2007 WI App 49, 730 N.W.2d 189**
  
  **Case:** An employee brought a wrongful discharge action against his employer, a publicly traded company, claiming that he was terminated in retaliation for his complaints to the comptroller and president about revenue reporting violations and his refusal to take part in the violations.
  
  **Holding:** The Wisconsin Supreme Court has adopted a narrow public policy exception to the employment-at-will doctrine in which an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy. This narrow public policy exception recognizes that the legislature has not and cannot cover every type of wrongful termination that violates a clear mandate of the public policy, instead the whistleblower law applies where an employee has no other recourse. In circumstances in which the legislature has created a remedial process, Wisconsin courts will not override that process with the judicially created public policy exception. Thus, in this case, in light of the narrow public policy exception, the court found that since the Sarbanes-Oxley Act of 2002, 18 U.S.C.S. § 1514A, affords employees wrongfully discharged under its provisions adequate relief, the employee should have availed himself of the Sarbanes-Oxley Act’s protection and relief. Accordingly, the court dismissed the employee’s state action.

- **Albrechtsen v. Wis. Dep’t. of Workforce Dev., 2005 WI App 241, 288 Wis. 2d 144, 708 N.W. 2d 1**
  
  **Case:** An employee filed a complaint with the Wisconsin Personnel Commission alleging that University officials had retaliated against him for activities protected by the whistleblower law. He later filed a federal lawsuit asserting violation of his rights under federal civil rights statutes, as well as his state whistleblower law claims.
  
  **Holding:** When an employee initiates an action in federal court alleging a violation of Wis. Stat. § 230.83(1), which prohibits retaliation for whistleblowing, the Wisconsin Personnel Commission loses jurisdiction over the complaint the employee had filed earlier in the state proceeding alleging the same violation.
Case: A nurse reported to a hospital president concerns that a doctor had an inappropriate relationship with a patient. Although the nurse resigned, she claimed that the hospital’s unwillingness to take action against the doctor was tantamount to a constructive discharge and filed a claim for wrongful discharge.

Holding: Wis. Stat. § 146.997 prohibits health care facilities from taking disciplinary action against staff who report violations of law or ethical standards by their employer. The plain language of the statute provides an employee with the opportunity to file a complaint, but does not require it. Therefore, the nurse may have been entitled to pursue an individual civil action for wrongful discharge under Wis. Stat. § 146.997. However, in this case, the nurse had failed to state an actionable claim for wrongful discharge because her employer did not thwart her efforts to file a complaint with the State Department of Regulation and Licensing. Nor did the hospital create intolerable working conditions for her after she filed a formal complaint with the State Department of Regulation and Licensing. Therefore, she was not "compelled" to resign and her wrongful discharge action was dismissed.

Case: An employee of the Wisconsin Department of Corrections claimed that she was given a written reprimand in retaliation for a memo she wrote to her supervisor complaining of mismanagement.

Holding: Under the whistleblower law, only certain disclosures made a particular way and regarding a subject matter covered in the statute will qualify for protection. According to Wis. Stat § 230.80(7), mismanagement requires the identification of more than a single management action. There must be a pattern of incompetent management actions. An employee’s identification of a single management action is insufficient to qualify as a disclosure of information relating to mismanagement and does not trigger protection from retaliation under the Wisconsin whistleblower law, Wis. Stat. §§ 230.80-230.89. Accordingly, the court concluded that the complaints included in the memo were not sufficient to qualify as a disclosure of information relating to management and therefore did not warrant protections under the whistleblower statute.

Case: Two employees who were concerned about the welfare of certain St. Croix Care Center residents filed several internal complaints with the centers administrators. When their internal complaints did not result in the resolution of the matter, the employees contacted the state officer entrusted with the duty of identifying, investigating, and resolving complaints made by or on behalf of providers of nursing home care. Both employees were terminated within the next several months, one allegedly for unprofessional conduct and breach of confidence, and the other due to claimed budgetary constraints.

Held: The court declined to adopt a broad whistle-blower exception for at-will employment. However, the court concluded that a wrongful discharge is actionable when the termination contravenes the public welfare and gravely violates public
interest. Where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents and the employee fulfills that obligation by reporting the abuse, the court will recognize a public policy exception to the employment at will doctrine. Thus, when an employee is terminated from his employment for fulfillment of this legal obligation, the employer will be exposed to a wrongful termination action.

6) HELPFUL LINKS

- Wisconsin Department of Health Services
- Wisconsin Department of Justice: Medicaid Fraud Control & Elder Abuse Unit
- Wisconsin Department of Safety and Professional Services
- Wisconsin Employment Relations Commission (WERC)
- Department of Workforce Development-Equal Rights Division
- Wisconsin Department of Health Services: Office of the Inspector General
- Wisconsin Department of Health Services: Division of Quality Assurance