

## Wisconsin Fair Employment Act: New Amendments Address Arrest and Conviction Discrimination in Licensing



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In Wisconsin, employees are afforded a broad array of rights and protections against wrongful employment actions taken by their employers by virtue of the Wisconsin Fair Employment Act (WFEA). For years, the WFEA has been used as both shield and sword to guard against employment discrimination, which the state legislature has described as “adversely affect[ing] the general welfare of the state.”<sup>1</sup> Local governments need to understand and apply the provisions of WFEA in two different capacities: first, in their role as employers to avoid prohibited employment practices; and second, as local licensing agencies, primarily in the context of issuing licenses to sell and serve alcohol beverages, under Chapter 125 of the Wisconsin Statutes.

The WFEA is not static and has undergone various changes throughout its lifespan. A recent change to the WFEA has made it easier for one of the protected classes under the Act – those with arrest or conviction records – to obtain an occupational license from a state or local “licensing agency.” This amendment is far from trivial, as 1 in 5 Wisconsin workers require a state occupational license to partake in their chosen occupation or profession.

Most employers, including local governments, are familiar with Title VII of the Civil Rights Act of 1964. This well-known federal anti-discrimination law prohibits discrimination based

upon race, color, religion, sex, and national origin, with respect to hiring, compensation, and the terms, conditions or privileges of employment. What some might not be aware of, however, is that Title VII provides only the floor for discrimination protections. State and local laws may provide additional protections for employees.

For example, Wisconsin has added even greater protections for employees than those provided by federal law. The WFEA, specifically Subchapter II of Chapter 111 of the Wisconsin Statutes, protects the same classes of employees as does Title VII. In addition, the WFEA bars employment discrimination against qualified individuals by reason of marital status, sexual orientation, military service, use or non-use of lawful products outside the employer’s premises during nonworking hours, as well as arrest and conviction records. It is this last class of persons, those with arrest or conviction records, who benefit from the amendments that became effective in August of 2018.

The recent amendments were enacted by the legislature as 2017 Wisconsin Act 278, which adds teeth to the WFEA by creating a statutory section 111.335(4), titled “Discrimination in Licensing.”

This section changes the circumstances under which a licensing agency may base its decisions to approve, deny, or revoke a license on an individual’s criminal history. Before Act 278 became effective

in August, a licensing agency was allowed to deny a license to an individual if that individual was subject to even a *pending* criminal charge, if the circumstances of the charge were “substantially related” to the circumstances of the particular licensed activity. Additionally, a licensing agency was within its rights to deny a license to an individual who had been convicted of any felony, misdemeanor, or other offense so long as the circumstances giving rise to the conviction were substantially related to the circumstances of the activity for which the license was sought.

Under the amended WFEA, the standards described above are retained, but with a few new wrinkles. First, the law has changed in regard to pending criminal charges. Now, a licensing agency engages in discrimination based on an individual’s arrest record if the agency refuses to license, or suspends an existing license, solely because the individual is subject to a pending criminal charge, unless the circumstances of the charge substantially relate to the circumstances of the licensed activity *and* the charge is for one of certain specified crimes against a child or life and bodily security, or a violent crime against a child.<sup>2</sup> In other words, in the pending criminal charge context, the “substantially related” standard is met only if the charge involved a “crime against life and bodily security” or a violent crime against a child.

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1. Wis. Stat. § 111.31.

2. Wis. Stat. §111.335(4)(a).

In addition to requiring that the circumstances of an arrest or conviction substantially relate to the circumstances of the licensed activity, the new law also prohibits a licensing agency from refusing to license an individual because the individual was adjudicated delinquent of an offense under the Juvenile Justice Code, unless the offense was one of certain specified crimes against a child or life and bodily security.<sup>3</sup>

The new law also provides some relief for those license seekers with a criminal conviction. If a licensing agency denies or terminates a license because of a conviction, the agency must state, in writing, its reasons for doing so, unless the conviction pertains to one of the specified crimes against a child or life and bodily security. This written statement must describe how the circumstances of the conviction relate to the particular licensed activity. The agency then must allow the individual an opportunity to show “evidence of rehabilitation and fitness to engage in the licensed activity.”<sup>4</sup>

The statute sets forth two items of evidence that *must* be accepted by a licensing agency to demonstrate rehabilitation and fitness to engage in the licensed activity: (1) documentation showing that the person was honorably discharged or separated under honorable conditions from the military and had no subsequent criminal convictions, or (2) documentation showing the individual completed his or her probation, extended release, or parole and, if the person served time in a correctional institute, that one year has passed since his or her release without subsequent conviction of a crime.<sup>5</sup>

Some of the provisions of Act 278 apply only to a “state licensing agency,” which is defined as a licensing agency that is a state “agency,” under Wis. Stat. §227.01(1).<sup>6</sup> For example, the new law specifies that an individual seeking a license may obtain a predetermination from a state licensing agency of whether he or she would be disqualified from being granted the license due to a prior conviction, before the individual submits a full application. A state licensing agency is also obligated to publish on its website a document indicating the offenses that may cause the agency to deny a license application. These provisions of the amended WFEA do *not* apply to municipalities issuing local licenses.

For many, the recent amendments to the WFEA were overdue. Proponents of the new law pointed out the troubling rate of recidivism for those with criminal records. If confronted with too many artificial barriers to employment upon re-entering society, individuals with criminal records often find themselves back in prison. Representative Warren Petryk, a co-author of the new law, stated that “we know that stable employment keeps people out of incarceration.”

Others saw the need for these changes based on the growing role of licensure in an individual’s ability to work. Senator Alberta Darling, the other co-author of the bill, remarked that one in four workers require some sort of credential to work in the United States (compared to one in twenty in 1950). Combine that with the fact that one-third of adults in the country have some sort of criminal record, and you are left with job prospects looking bleak for a large swath

of the population, if a license can be denied for any prior conviction.

Legislators and other stakeholders are hopeful that the amendments to the WFEA will alleviate some of these issues by removing employment barriers to those ready, willing, and able to work, while still ensuring that ex-offenders who were convicted of violent crimes or crimes against children do not enjoy the new law’s protections.

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3. Wis. Stat. §111.335(4)(b).

4. Wis. Stat. §111.335(4)(c).

5. Wis. Stat. §111.335(4)(d).

6. Wis. Stat. §111.335(1m)(c).