

***Operating Under Wisconsin's Fair Employment Law
for Employment and Licensing Decisions***

(Revised)

**Wisconsin League of Municipalities
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Presented By:

von Briesen

von Briesen & Roper, s.c. | Attorneys at Law

James R. Macy

jmacy@vonbriesen.com

(920) 232-4841

I. Licenses and Certifications – According to the Bureau of Labor Statistics, licenses are normally legally required by the government to work in an occupation; certifications are not. The BLS demonstrates the differences as follows:

1. License
 - A. Awarded by a governmental licensing agency
 - B. Gives legal authority to work in an occupation
 - C. Requires meeting predetermined criteria, such as having a degree or passing a state-administered exam.
2. Certification
 - A. Awarded by a professional organization or other nongovernmental body
 - B. Is not legally required in order to work in an occupation
 - C. Requires demonstrating competency to do a specific job, often through an examination process.
3. As of 2015, 22% of employed persons had a license. Of those with a license, less than 10% had less than a high school education, while almost 50% of those had an advanced degree.

II. Job Qualifications and Validation

1. The Equal Employment Opportunity Commission indicates that the use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or “UGESP” under Title VII. *See* 29 C.F.R. Part 1607. UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.

2. Case Examples.
 - A. *EEOC v. Ford Motor Co. and United Automobile Workers of America, (2005)* involved a court-approved settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking

a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, Ford paid \$8.55 million in monetary relief.

- B. *EEOC v. Dial Corp.* (CA 8th, 2006), involved a case where women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women. Dial defended the test by noting that it looked like the job and use of the test had resulted in fewer injuries to hired workers. The EEOC established through expert testimony, however, that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination.
- C. *EEOC v. Daimler Chrysler Corp.* (2008) involved a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotape providing the same information.

III. Application of Wisconsin's Fair Employment Law

1. Applicable Statutory Provisions –

A. Declaration of Policy - Sec. 111.31

*(1) The legislature finds that the practice of unfair discrimination in employment against **properly qualified individuals** by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or*

political matters, substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies, and licensing agencies that deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters, deprive those individuals of the earnings that are necessary to maintain a just and decent standard of living. (Emphasis added).

*(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all **properly qualified individuals** regardless of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.*

B. Definitions – Sec. 111.32

(10) "License" means the whole or any part of any permit, certificate, approval, registration, charter or similar form of permission required by a state or local unit of government for the undertaking, practice or continuation of any occupation or profession.

C. Arrest and Conviction Record – Sec. 111.335 (New provisions effective August 1, 2018 (2017 Wis. Act. 278)).

(2) DISCRIMINATION BECAUSE OF ARREST RECORD; EXCEPTIONS.

(a) Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge

*substantially relate to the circumstances of the particular job or licensed activity, **except as provided in sub. (4)(a).***

(3) DISCRIMINATION BECAUSE OF CONVICTION RECORD; EXCEPTIONS

(a) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual **if any of the following applies to the individual:**

1. Subject to sub. (4) (b) to (d), the individual has been convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.

2. The individual is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation, or established business practice of the employer.

(b) Application to private detectives, investigators and security personnel

(c) Application to burglar alarm installers

(d) Application to those refusing to sign up for selective service

(e) Application to educational agencies and felonies.

(f) Application to those knowingly use or claim false academic credentials.

New Section 111.335(4)- DISCRIMINATION IN LICENSING.

(a) It is employment discrimination because of **arrest record** for a licensing agency to refuse to license any individual under sub. (2) (b) or to suspend an individual from licensing under sub. (2) (b) solely because the individual is subject to a pending criminal charge, unless the circumstances of the charge substantially relate to the circumstances of the particular licensed activity and the charge is for any of the following:

1. An exempt offense.

(Section 111.335 (1m)(b) defines an exempt offense as:

(b) “Exempt offense” means any of the following:

1. A violation specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06 948.07, 948.075, 948.08, 948.085, or 948.095.

2. A violation of the law of another jurisdiction that would be a violation described in subd. 1. if committed in this state.

2. A violent crime against a child.

(Section 111.335(1m) (d) defines a violent crime against a child as:

(d) “Violent crime against a child” means any of the following:

1. A violation of s. 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c) or (5) (a) 1., 2., 3., or 4., 948.05, 948.051, 948.055, 948.07, 948.08, 948.085, 948.095, or 948.30 (2).

2. A felony violation of s. 948.03 (3) or (5) (a) 4.

3. A violation of the law of another jurisdiction that would be a violation described in subd. 1. or 2. if committed in this state.

(b) It is employment discrimination because of **conviction record** for a licensing agency to refuse to license any individual under sub. (3) (a) 1. or to bar or terminate an individual from licensing under sub. (3) (a) 1. because the individual was adjudicated delinquent under ch. 938 for an offense other than an exempt offense.

(c) Requires a licensing agency that refuses, bars or terminates a license to state in writing the reasons for doing so and how the conviction substantially relates **and** allow the individual to show evidence of rehabilitation and fitness to engage in the activity. If demonstrated, agency cannot refuse, bar or terminate license.

(d) Describes how an individual can demonstrate evidence of rehabilitation and fitness to engage in the activity. (honorable discharge, serving probation, supervision, parole – at least one year from release without other incidents. Then agency can consider:

- nature and seriousness of the offense
- mitigating circumstances and social conditions
- the age at time of offense
- the length of time since offense
- letters of reference
- all other relevant evidence

(e) - (f) Apply to State licensing agencies.

(h) It is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under ch. 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

1. Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41 (1).
2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41 (1m).
3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41 (1) or (1m).
4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41 (1) or (1m).
5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a law of another state that is substantially similar to s. 961.65

(See also 2017 Wis. Act 289, effective July1, 2018)

(i) Application to private detectives, investigators and security personnel

(j) Application to board of nursing.

D. Disability – Sec. 111.24

- ... *it is not employment discrimination because of disability to refuse to hire, employ, admit or license any individual, to bar or terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure.*
- ... *In evaluating whether an individual with a disability can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-*

case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.

- ... *If the employment, membership or licensure involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employee or applicant can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.*

2. Applicable Cases

- A. **Williams v. Medical College of Wisconsin** (LIRC, 10/10/11). The proper inquiry in an arrest and conviction record case is what actually motivated the employer's decision to take the action it did. In this case, the Respondent was aware of the Complainant's conviction, but this was not the reason for her discharge. The Respondent continued to employ the Complainant for eight months after learning about the conviction and only terminated the employment relationship because of a sincere (if mistaken) belief that it was no longer permitted to employ the Complainant as a caregiver because of the law relating to Caregiver Background Checks.
- B. **Nunn v. Dollar General** (LIRC, 03/14/08). Although the WFEA allows employers to *suspend* the employment of employee's who are charged with, but not yet convicted of, certain offenses, it is illegal to *discharge* an employee because of an *arrest*.
- C. **Rathbun v. City of Madison** (LIRC, 12/19/96). The City, a licensing authority, temporarily suspended the Complainant's taxicab driver's license pending the resolution of criminal charges against him. The charges against the Complainant (which included sexual assault and threatening to injure another while in possession of a dangerous weapon) were later dismissed approximately two months later. The City then re-issued the Complainant's taxicab driver's permit. While the Complainant provided evidence that he was damaged because of the denial of his taxicab driver's permit for two months, he did not establish probable cause to believe that the City unlawfully discriminated against him under the WFEA.
- D. **Gustafson v. C.J.W., Inc.** (LIRC, 03/21/89). In this case the employee drove a truck for the employer. While off duty, he was arrested for driving while under the influence, getting in an accident and having a blood alcohol content of .10 or more. The employee self-reported the incident to his employer. The employer terminated the employee because they could not have anyone driving for them

who had a driving while intoxicated offense on their driving record for their insurance reasons. At hearing, the employer argued the reason for the termination was because the employee admitted he was driving while drunk, got in an accident and tested with over a .10 BAC. Unfortunately, that is not what they put in the letter of termination and therefore were found to have discriminated on the basis of arrest.

- E. *Law Enforcement Standards Bd. v. Lyndon Station*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981). A licensing board's refusal to certify an applicant as a law enforcement officer because of a previous felony conviction for falsifying traffic citations did not constitute discrimination because the circumstances of that offense substantially relate to the office of Chief of Police. Common sense dictates that a conviction of the felony of misconduct in public office for falsifying traffic tickets bears a substantial relationship to the duties of a police officer who is called upon to issue traffic citations.
- F. *Jones v. Central Regional Dental Testing Serv.* (LIRC, 02/29/96) In a licensing discrimination case, the Complainant must initially show that he applied for the license in question. Where the Complainant never applied for a license (to practice dentistry, in this case), he cannot proceed on a complaint alleging that he would have been denied a license had he applied.
- G. *Haynes v. National School Bus Service* (LIRC, 01/31/92). A Respondent reasonably suspended a Complainant until the State Department of Motor Vehicles could determine if her diabetes condition should disqualify her from driving a school bus. Since it is the Department of Motor Vehicles, through its licensing requirement, rather than the employer who determines whether an individual is qualified to operate a school bus safely, an employer fulfills its duty of individual evaluation by suspending the individual driver until the State can make its determination. In essence, the Complainant's diabetes condition was reasonably related to her ability to adequately undertake the job-related responsibilities of a school bus driver during the period of her suspension.

IV. Application of Section 62.13(5) Disciplinary Actions Against Subordinates

- 1. Applicable Statutory Provisions
 - A. **(em)** No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges.
- 2. Unique Issues
 - A. Discipline versus Qualifications
 - 1. Failure to maintain necessary qualifications

- a. Ability to Carry a Weapon
- b. Maintaining Residency Requirement
- c. Maintaining Driving Privileges

B. Inability to Perform the Duties

- 1. Brady/Giglio Issues
 - a. Disclosure to Defense Counsel
 - b. Decision Never to Call as a Witness
 - c. Decision to Not Call as a Witness and Always send second officer.

V. Conclusion