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*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

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## “Fair Employment Act” Protects Convicted Felons, Costs Employers

Wisconsin is one of only six states that expressly include convicted felons as a protected class of citizens under its Fair Employment Act. This affords a criminal conviction the same protection as age, race and creed under the law.<sup>i</sup>

For employers looking to hire workers, this special status can lead to costly lawsuits and a no-win liability trap. Hire the convicted felon and be responsible for their actions, or refuse to hire and be subject to a costly lawsuit.

AB 286/SB 207 would protect businesses by reducing unjustified litigation threats while aligning Wisconsin law with the vast majority of other states.

The bill also preempts cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record.

### Background of Wisconsin Fair Employment Act

The current Wisconsin Fair Employment Act (WFEA) prohibits employment discrimination based on age, ancestry, arrest record, *conviction record*, creed, color, disability, marital status, military service, national origin, race, sex, or use or nonuse of legal products during nonwork hours off the employer’s premises.

The WFEA does provide an exception to the conviction record prohibition where the “felony, misdemeanor or other offense...substantially relates to the circumstances of the particular job.”<sup>ii</sup> However, the “substantially relates” exception is not well defined in the statutes. Courts and administrative agencies have broad discretion when applying this standard and therefore it is not at all clear to businesses how the exception will be applied when hiring or terminating an individual.

### Law has been a Deterrent to Businesses while Protecting Violent Criminals

Although current law provides an exception allowing employers to refuse to hire or terminate a person based on their conviction record if it “substantially relates” to the job the exception is broadly written and fails to provide employers the necessary guidance they need to run their businesses. As a result of the law, employers may face costly and dubious lawsuits from individuals who were either terminated from their position or not hired, simply because the person may have had a conviction record.

A convicted felon who is not hired or terminated merely has to file a claim under the WFEA and seek damages, likely forcing the employer to settle the case or incur unnecessary expenses fighting the lawsuit.

More troubling, the law protects violent criminals over employers.

**The “Halloween Killer,” Gerald Turner:** Known as the “Halloween Killer,” Gerald Turner was convicted of raping and murdering a 9-year-old girl who disappeared while trick-or-treating in Fond du Lac. After his release from prison Turner applied for a job sorting recyclables at Waste Management, Inc. in Madison. After Waste Management refused to hire him, Turner filed a lawsuit under the WFEA. An administrative law judge found probable cause that unlawful discrimination based on conviction records had occurred.<sup>iii</sup> As a result, Waste Management settled out of court with Turner for an undisclosed amount of money.

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**Milwaukee Public Schools Case:** Another example is a case involving Mark Moore who was convicted of throwing hot grease from a pan at his girlfriend, which instead hit a 20-month-old child, causing severe burns to the child. After serving time in jail, Moore was hired as a maintenance person with the Milwaukee Public Schools (MPS) system. After learning of his conviction, MPS terminated Moore for intentionally falsifying his employment application by failing to include his conviction.

Moore reapplied for a similar job but was not hired by MPS. Moore then filed a discrimination lawsuit under the WFEA against MPS with the Department of Workforce Development. The Court of Appeals concluded that MPS unlawfully discriminated against Moore based on his conviction record. Applying the nebulous “substantially related” test, the court ruled that the circumstances of Moore’s conviction were not substantially related to the job of Boiler Attendant Trainee.

### **Wisconsin Should Remove Convicted Felons as a Protected Class under the WFEA**

It is time for Wisconsin to remove the conviction record as a basis for discrimination under the WFEA for the following reasons:

- The current law is undesirable because it expressly grants individuals with conviction records the same status of a protected class. A person’s conviction record should not be placed in the same category as other bases of discrimination, such race, sex, religion, and other commonly protected classes.
- The current law is undesirable because it expressly grants individuals with conviction records the same status of a protected class. For example, under Title VII of the Civil Rights Act of 1964, if an employer’s hiring policy has a “disparate impact” on minorities and is not justified by a business necessity, it is unlawful.
- WFEA’s convicted records prohibition denies employers the ability to truly assess job applicants. An applicant’s character and his or her propensity to commit crimes are highly relevant to businesses when making hiring decisions. A strict application of the law against employers’ use of conviction records denies employers an important element in their hiring decisions.
- Like many other states, Wisconsin recognizes negligent hiring as a tort action. Therefore, a Wisconsin business could potentially be negligent for hiring a person with a conviction record if the employer knew, or should have known, the person was prone to commit a crime against a third party while performing the employee’s job duties.

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<sup>i</sup> Thomas M. Hruz, Comment: *The Unwisdom of the Wisconsin Fair Employment Act’s Ban on Employment Discrimination on the Basis of Conviction Records*, 85 Marq. L. Rev. 779, 781 (Spring 2002).

<sup>ii</sup> Wis. Stat. § 111.335(1)(c)(1).

<sup>iii</sup> Thomas M. Hruz, *Criminals Escaping Affliction: Gerald Turner and Wisconsin’s Fair Employment Law*, WI: Wisconsin Interest, Winter 2000, at 7.

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