

HOW DISQUALIFYING ARE CONVICTION RECORDS?

LAW | A proposed law has employers talking about the conviction records of job applicants, but what are the best practices?

State law prohibits job discrimination against people with conviction records, unless the crime is “substantially related” to the job or the work environment. This standard, established under the Wisconsin Fair Employment Act, would be removed under a proposed state law, but ideally, how should a business approach the matter of employing people with conviction records? What rights do employers have if they find that an employee misled them about his or her conviction record? IB asked employment law attorneys to weigh in as to best HR practices.

Strong convictions

Attorney Tom Godar, a shareholder with Whyte Hirschboeck Dudek, said there is legal guidance but also some gray areas. “My advice is that such decisions, once information is available to an employer, must be approached with caution and on a case-by-case basis to determine the substantial relationship, and determine whether it’s consistent with the way the administrative law judges and courts have interpreted that substantial-relationship test,” Godar said.

“The real question an employer has to ask is whether or not the traits revealed by the

crime show a tendency to become engaged in conflicts or other kinds of problems that would relate to the job.”

For example, disorderly conduct is a fairly common conviction. According to Godar, the traits for disorderly conduct found by the Labor and Industry Review Commission, an independent administrative agency that rules on appeals in cases involving unemployment insurance, worker’s compensation, and equal rights, include the tendency to become engaged in conflicts, to become violent, to exhibit poor self-control, and to lack judgment or simply refuse to follow orders.

“You have to look at those traits and compare them to the circumstances of the job because the job might be one where there is stress and conflict, potentially. You must have the ability to implement decisions and follow directions on a regular basis, so you have to take that kind of careful approach to assessing whether or not a particular conviction substantially relates to the traits of the job.”

Attorney Lori Lubinsky, a partner with Axley Brynson, said the burden on employers is not light – it’s substantial. There are elementary examples, such as the person who has been convicted of child abuse and applies for a job to drive a bus that transports kids to school. The circumstances of that crime substantially relate to the job. But what about a person who applies for a job on an assembly line and has prior convictions for disorderly conduct or battery?

“Some employers are concerned when they see those things because of the relationship that employee will have with other employees,” she noted. “There are gray areas, the burden is on employers, and that burden is a high standard. Generally speaking it is more difficult for the employer to prove a substantial relationship.

“From a public policy standpoint, that may be good or that may be bad, but that’s just the reality.”

SOURCES Find them at: IBMADISON.COM/ED

Tom Godar, attorney
Shareholder, Whyte Hirschboeck Dudek

Lori Lubinsky, attorney
Partner, Axley Brynson

Christopher Banaszak
Attorney, Reinhart Boerner Van Deuren

Workplace confidential

Godar noted that people with felony conviction records have no confidentiality when it comes to job applications, but some discretion is advised regarding how much other members of the company's workforce should know. "Certainly, the record of any criminal conviction, for those who are adults, is public record and there is no confidentiality," he noted. "A different question might be once you have that information within your human resources group, or at the employer's workplace, what kind of confidentiality should you accord that information from a good business practices, best-practices standard?"

"That should be like almost all other human resource information or personnel information. It should only be disclosed on a need-to-know basis."

Lubinsky noted that most job applications in Wisconsin require prospective employees to state whether they have ever been convicted of a crime. They could choose not to answer the question, in which case the employer would have the right not to consider the application. They also can choose to answer it honestly or dishonestly; if they choose the latter, they have falsified an application and that by itself is grounds for not hiring somebody or for termination. If they answer it truthfully, then the substantial relationship test comes into play.

Asking the right question and having the right qualifiers on the employment application can save employers some trouble.

"What I advise employers is that your employment application should state that if we, the employer, at any time find any information that you provide on this application is false, that is grounds for your immediate termination," she counseled. "It's not always for a 'catch you.' The real reason is that you want to encourage people to be truthful. It really does force people to be forthright about it."

Christopher Banaszak, an attorney with Reinhart Boerner Van Deuren, suggested that employers not react in a knee-jerk fashion if they find out they have been lied to. "It's like anything else in that it's going to depend on the facts," he stated. "If it was many years ago, and it was a minor offense, and the employee has a reasonable explanation for why he or she didn't put it on there, that's something that may not end up in a termination. If there is something that

AB286

Controversial bill would give employers more power to deny employment to people with conviction records, but at what cost?

The state of Wisconsin has an interest in creating the best possible environment for economic growth, and it also has an interest in rehabilitating people who have been convicted of a felony. The former impulse is the motivation behind Assembly Bill 286, which would eliminate protections against conviction record discrimination, and prevent local ordinances from providing that protection.

Under the Wisconsin Fair Employment Act, employers must show that a crime is "substantially related" to a job or work environment when they turn down the employment application of a convicted felon. Not only would AB 286 remove the substantially related standard, and not only would it prohibit local and county governments from enacting their own standards, it would void any such municipal statutes that now exist.

The justification? Legislative sponsors like State Rep. Joel Kleefisch, R-Oconomowoc, believe job creation is job one for lawmakers, and any law that potentially exposes employers to costly lawsuits is not helpful.

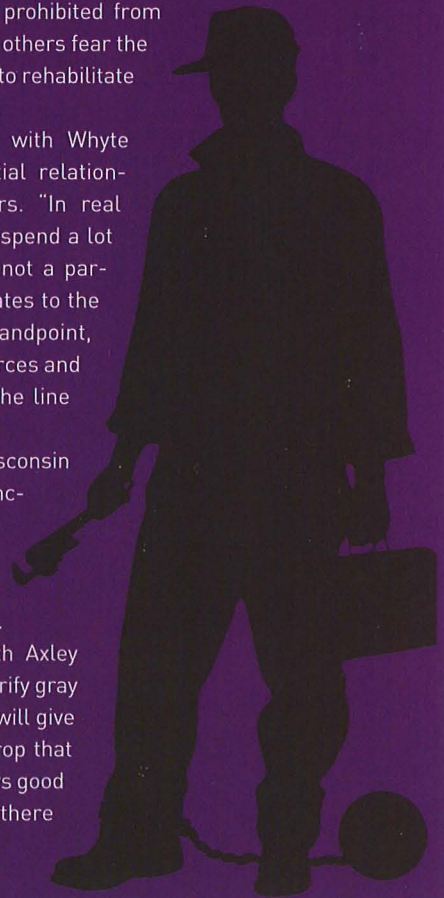
The knock? It flies in the face of the Republican philosophy of local control because it would not allow local governments to exercise discretion or consider local employment needs. "This is an interesting approach, given the same Legislature is also stating that the state should not be in the business of dictating uniform standards on items such as sex education, and that local boards should be entrusted to decide what is best for the locality," noted Madison attorney Bob Gregg, a partner in the Boardman Law Firm.

Even though employers would not be prohibited from employing people with conviction records, others fear the measure could make it next to impossible to rehabilitate people who have served time in prison.

Attorney Tom Godar, a shareholder with Whyte Hirschboeck Dudek, said the "substantial relationship" test is problematic for employers. "In real applications, it does cause employers to spend a lot of time trying to determine whether or not a particular criminal offense substantially relates to the activities of the job," he said. "From that standpoint, it creates the need to spend scarce resources and time to make sure you're not crossing the line of the law."

With the existing law, Godar said Wisconsin has attempted to make "a pretty fine balancing" of its desire to provide employment opportunities for those who have violated the law, and employers who want to create or maintain an excellent workplace.

Attorney Lori Lubinsky, a partner with Axley Brynson, called AB 286 an attempt to clarify gray areas in the law. "Overall, this legislation will give employers a very black-and-white backdrop that was once gray," she said, "and that's always good from an employers' perspective because there is more clarity."





"IT CAN BE HARD TO EVALUATE, DEPENDING ON WHAT THE CRIME IS AND WHAT THE JOB POSITION IS. IT CAN BE A VERY TOUGH EVALUATION." – Christopher Banaszak

is more serious and more recent, where it's pretty clear they intentionally withheld that information, it's probably something that is going to be looked at more seriously."

According to Lubinsky, private employers conduct background checks using sources like the Consolidated Court Automation Program for criminal and civil activity at the circuit court level, Public Access to Electronic Record searches from federal appellate, district, and bankruptcy courts, or Department of Motor Vehicles checks. Some private employers who have federal obligations to conduct drug testing have better access to background information, but most employers are doing some fundamental background check.

Arrested development

Convictions are one thing, but Godar, citing limitations of the current law, said employers need to be aware that as a rule, arrests cannot give rise to terminations. "An employee is eligible to retain their position, even if there is a suspension while you review the circumstances of the arrest and the substantial relationship. If it seems that they are substantially related, the employee may be suspended for a long time as the case works its way through the process," he said.

Employers should be aware that if they have independent information that is developed not as the result of an arrest or a conviction or a police report, and it's information that could disqualify somebody from

employment, they can make a decision to terminate based on that. "That's called the Onalaska defense based on a case called Onalaska," Godar noted, "but employers should be cautious to just say, 'I read the police report and therefore I have independent information and the police would not have written it down this way if it weren't true.' That would not be an appropriate defense.

"If you read in the newspaper that so-and-so was arrested, and maybe it's for a very heinous crime such as child abuse or a battery," he continued, "you cannot terminate the employee because of a mere arrest because they are presumed innocent until they are proven guilty, but you may be able to suspend the employee."

With employee arrests, there is more leeway for employers in another circumstance. If an arrest is made at work and somebody had illegal drugs in his or her locker, an employer can make a determination based on an eyewitness evaluation of what took place in the workplace. The same applies to witnessing disorderly conduct or battery of another employee at the workplace. "You can make your decisions based on that," Godar stated, "but if you just read about the arrest or just hear rumors of it, or if you base it on a newspaper account or the arrest report of the officer, that would not be sufficient."

The bill is due

None of the attorneys interviewed took the opportunity to comment on the merits or demerits of AB 286 from their own perspective, but they did comment from the employer's perspective. The rationale for the bill is definitely employer-centric.


"It would make some changes in particular in how felony convictions are treated," Banaszak noted. "You could use a felony conviction to automatically disqualify someone from employment. One of the struggles you have as an employer under the current statute, with this substantially related language, is that you may have someone who commits a fairly serious crime but then you still have to go back and go through this analysis.

"If employers had a provision that allows them to deny employment without making a showing that the felony conviction is substantially related to the job applied for, that would certainly make it much easier for them to administer."



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