

Wisconsin Employers: Do Your Job Postings Run Afoul of the Wisconsin Fair Employment Act's Prohibition Against Conviction Record Discrimination?

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Believe it or not, individuals with criminal convictions can make a business out of trolling online job boards for job postings that express an intent to discriminate against applicants with conviction records—think job postings with “no felonies” as a qualification. Postings of this type run afoul of the Wisconsin Fair Employment Act, which prohibits employers (1) from circulating job ads and applications that express an intent to discriminate against applicants with conviction records and (2) from refusing to hire applicants because of their arrest or conviction record (among other types of discrimination directed at individuals with arrest and conviction records). Postings that violate this prohibition can cost your company a whole lot of headache and money. Penalties range from a cease and desist order to job reinstatement and backpay if the applicant can show he or she would have been hired but for her conviction.

If you are asking yourself “must my company employ all convicts no matter the crime?” Do not fret. There are exceptions to the rule. The principal exception applies to all types of employers and arises when the conviction is substantially related to the particular job. The exception balances the desire to reintegrate convicted criminals into society with the risk of recidivism. With those goals in mind, the “substantial relationship” test examines the elements of the crime and assesses whether the circumstances of the job would provide a greater than usual opportunity for the individual to re-offend. Whether a conviction is substantially related to the job must be determined on a case-by-case basis. Blanket prohibitions against employing individuals with conviction records, whether stated in a job posting or not, violate the law.

What to do? Employers should review their hiring policies, background check policies, and job postings to ensure they do not contain or signal blanket prohibitions against hiring individuals with convictions or felonies. Phrases like “no felonies,” “no criminal record,” and “clean background check” should be deleted from job postings and applications. Hiring policies requiring a case-by-case assessment of applicants with conviction records based on the substantial relationship test should also be adopted. Employers should consider whether background checks

are necessary for all new hires, or whether it makes more sense, financially and from a risk perspective, to limit background checks to certain sensitive positions. In all cases, background checks must comply with federal law, including the Title VII and the Fair Credit Reporting Act (FCRA). They should also be completed after a conditional offer, but before the employee's first day of work. And one final word of caution: using a staffing agency will not insulate your company from liability. So make sure their policies and postings comply with the law as well.

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Topics

Title VII, Background Checks, Policy, Title VII Of The Civil Rights Act Of 1964, Criminal History, Conviction Record, FCRA, Fair Credit Reporting Act, Wisconsin Fair Employment Act, WFEA, Criminal Conviction, Arrest Record, Hiring Policy, Substantial Relationship